DOCUMENT RESUME

ED 198 197 UD 021 082

TITLE	The Tarnished Golden Door: Civil Rights Issues in Immigration: A Report of the United States Commission on Civil Rights.
INSTITUTION	Commission on Civil Rights, Washington, D.C.
PUB DATE	Sep 80
NOTE	161p.
AVAILABLE FROM	Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.
EDRS PRICE	MF01/PC07 Plus Postage.
DESCRIPTORS	*Civil Rights: Ethnic Discrimination: Federal Legislation: Illegal Immigrants: *Immigrants: Immigration Inspectors: *Law Enforcement: Legal Problems: Public Policy: Racial Discrimination
IDENTIFIERS	Department of State: *Immigration: Immigration and Naturalization Service

ABSTRACT

This report represents the findings and conclusions of the United States Commission on Civil Rights with respect to the administration of justice in the enforcement of the immigration laws of the United States. The first section discusses past and present discriminatory provisions of immigration laws. The second section focuses on problems in the practices and procedures of the Immigration and Naturalization Service (INS) and the State Department in administering immigration laws and how those practices affect citizens, aliens, and intending immigrants. The third section concentrates on employer sanctions, a proposed legislative solution to immigration problems. The fourth section examines the constitutional rights provided to persons during various stages of the immigrant expulsion process and the effects that process has on persons other than those subject to deportation. The last section examines current INS complaint investigation procedures. (Author/MK)

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ED198197

The Tarnished Golden Door

Civil Rights Issues in Immigration

U S DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
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A Report of the United States Commission on Civil Rights

September 1980

U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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Arthur S. Flemming, *Chairman*
Stephen Horn, *Vice Chairman*
Frankie M. Freeman
Manuel Ruiz, Jr.
Murray Saltzman

Louis Nuñez, *Staff Director*

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LETTER OF TRANSMITTAL

U.S. COMMISSION ON CIVIL RIGHTS
Washington, D.C. 20425
September 1980

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

Sirs:

The United States Commission on Civil Rights transmits this report to you pursuant to Public Law 85-315, as amended.

The Tarnished Golden Door: Civil Rights Issues in Immigration is based on a Commission hearing in Washington, D.C., in November 1978 and on months of research preceding and following that hearing. The report examines the current immigration system and the civil rights problems encountered in that system by American residents, particularly those citizens and aliens who are racially and culturally identifiable with major immigrant groups. Although the United States has been variously characterized as "a nation of immigrants" and a "melting pot," strangers migrating to its shores have often met resistance from previous generations of immigrants. In part, this resistance is reflected in current immigration laws, procedures, and practices that often fail to accord these peoples the constitutional safeguards available to other United States citizens, America's "old" immigrants.

Generally, the report reaches two conclusions: current immigration laws still contain discriminatory provisions, and current immigration laws and the practices and procedures for the enforcement of those laws result in the denial of the rights of American citizens and aliens. To remedy the problems that led to these conclusions, the report offers recommendations for improving immigration law and procedure.

Some of the specific problems discussed in this report will require legislative remedies, while others may be solved more readily by administrative action. It is our hope that this report, with its findings and recommendations, will prompt immediate corrective action, for we believe that American residents with ethnic characteristics similar to major immigrant groups have suffered too long from the burdens attendant upon immigrant or alien status in American society.

Respectfully,

Arthur S. Flemming, *Chairman*
Stephen Horn, *Vice Chairman*
Frankie M. Freeman
Manuel Ruiz, Jr.
Murray Saltzman

Louis Nuñez, *Staff Director*

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ACKNOWLEDGMENTS

Richard Baca, former General Counsel, had overall responsibility for designing and planning the first half of the project. Reita P. Pendry, former Assistant General Counsel, coordinated initial field investigations. Field investigations were done by the following current and former staff members of the Office of General Counsel: Reita P. Pendry, Nicasio Dimas, Jr., Linda Huber, Debra Miron, Donald Chou, and Phyllis K. Fong. Prior to the national hearing, Nicasio Dimas, Jr., former Acting Assistant General Counsel, became the project director and guided the project through the completion of the first draft of the report. The report was written by Nicasio Dimas, Jr., Donald Chou, and Phyllis K. Fong. During the latter stages of the drafting of this report, Donald Chou, attorney-advisory, assumed the duties of project director. Eileen Stein, General Counsel, provided the overall supervision for the final preparation of the report.

Editorial and technical assistance were provided by: Carol-Lee Hurley, Laura Chin, Jack Hartog, Emily Marwell, Debra Schirm, Newton Chu, Gloria Gonzalez, Michael Kramer, Maria Echaveste, Marlene Cintron, Alvin Matthews, Nina G. Rosoff, Helen Loukas, and Shirley Hill Witt.

Assistance was also provided by: Lorraine W. Jackson, Treola J. Grooms, Ana M. Beitia, Connie Lee, DeBorah Marks, Mary Grose, Brenda Blount, Gwen Morris, Angela Randolph, Stephanie Campbell, Vivian Washington, Vivian Hauser, Deborah Harrison, Audree Holton, and Tanya Wideman.

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Introduction

"Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore;
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!"
From "The New Colossus," an 1883 Emma Lazarus
poem affixed to the Statue of Liberty

America is a nation of immigrants and their descendants.[1] The noted historian Oscar Handlin once wrote, "Once I thought to write a history of the immigrants in America. Then I discovered that the immigrants *were* American history."[2] Indeed, the contributions of the approximately 50 million immigrants who have come to our shores since 1607 have been great. The names of immigrants and their children and their children's children dot the history of America, for it was their labor and toil that built this country. They have made significant contributions to the building of America in industry, politics, the professions, and the arts. They have brought customs and traditions which have been absorbed into our eclectic culture and proclaimed as truly "American." As the late President John F. Kennedy said: "There is no part of our nation that has not been touched by our immigrant background. Everywhere immigrants have enriched and strengthened the fabric of American life."[3]

To many of those who came, the golden door of our borders symbolized a spirit of liberty, a spirit which was reflected in the free and democratic traditions of our society. Beyond that golden door, they saw a land of opportunity where the hopes and aspirations of any individual could be fully realized. For the world's poor and oppressed, this country represented a refuge in which they could attain a better way of life. To others, passage through the golden door meant escape from either religious persecution, political tyranny, or economic hardships. Thus, the inscription on the Statue of Liberty is truly a declaration of our humanitarian spirit, the best of American traditions.

The image of the golden door, however, is a tarnished one. In the history of American immigration each succeeding group of immigrants met with resistance, ironically, from previous immigrant groups. During times of economic stress, American treatment of immigrants has often been cruel. The anti-Catholic, anti-Chinese, anti-Mexican, and other anti-alien eras in American immigration history are replete with examples of such treatment. Because of their status as recent immigrants in the United States, these various groups were extremely vulnerable and politically powerless and thus were ideally suited for the role of scapegoat for America's economic and social woes. Few were left unscathed and for many the American dream became the American nightmare.

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[1] Although American Indian people and some historians maintain that American Indians are native to this continent, other anthropologist-historians maintain that American Indians are also immigrants, having migrated from Asia over a previously existing land bridge.

[2] Oscar Handlin, *The Uprooted* (2d ed. 1973), p. 3.

[3] John F. Kennedy, *A Nation of Immigrants* (rev. 1964), p. 18.

Anti-alien sentiment was translated into discriminatory treatment of immigrants. Restrictions on the immigration of certain religious, political, racial, or ethnic groups became a rallying point for many Americans as the cure-all for the American economy. In the Federal bureaucracy, the response often was a disregard for proper constitutional safeguards for detained persons. For example, in the 1950s during "Operation Wetback,"[4] the administrative expulsion process was shortened to achieve speedier deportations. And immigration agencies often exacted greater documentary requirements of immigrants from certain countries, thereby creating a discriminatory immigrant selection process.

The arbitrary and discriminatory treatment of aliens has been conducted with the approval of American legislative bodies. State legislatures as well as the Congress have enacted legislation limiting the full participation of aliens or immigrants in our society. Such legislation not only discriminated against recent arrivals to America, but has also contributed to the suffering of United States citizens[5] and long-time resident aliens,[6] particularly those who were racially and ethnically identifiable with major immigrant groups.

Because a discriminatory immigrant selection system, improper interrogation methods, and unconstitutional searches and seizures still exist within the current immigration law enforcement process, citizens and long-time residents suffer violations of their civil rights. For the undocumented alien,[7] the system offers a much harsher reality. Because deportation is not characterized legally as "punishment," aliens are denied many constitutional protections available to defendants in criminal proceedings. Deportation, however, is a more severe punishment than many criminal sanctions. In drafting the Virginia Resolutions objecting to the Alien and Sedition Acts of 1798, James Madison, father of the Constitution and later President, wrote as a member of the Virginia Assembly in 1800:

> If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for and where he may have nearly completed his probationary title to citizenship; if, moreover, in the execution of the sentence against him he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes, which his emigration itself may have provoked; if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.[8]

Almost a century later, Justice David J. Brewer quoted Madison's views in his dissent in *Fong Yue Ting* v. *United States* when he argued that deportation was indeed the most severe of punishments.[9]

The United States Commission on Civil Rights in recent years has become increasingly concerned about inadequate public understanding of and inaccurate information on the migration of immigrants to this country. Allegations and complaints of civil rights violations in the enforcement of the immigration laws have been received by the Commission from aliens as well as citizens and long-time residents.

In 1977 the Commission undertook a study of the civil rights problems in immigration law, practice, and procedure. In identifying and exploring the impact of those problem areas on the civil rights of citizens, resident aliens, and undocumented aliens, Commission staff conducted intensive background research and field investigations. Hundreds of individuals were interviewed, including representatives of community organizations and immigrant service organizations; officers of business groups and unions; attorneys and other immigration practitioners; Immi-

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[4] "Operation Wetback" is discussed in chapter 1 of this report.

[5] Generally, citizens are persons born in this country, persons born of United States citizen parents abroad (although a residency requirement may be imposed), and persons who have been naturalized. Naturalization, the conferring of citizenship on a foreign national, requires that the individual have resided continuously in the United States for 5 years, be of good moral character, able to read, write, and understand ordinary English, and have an understanding of American history and the principles and form of our government.

[6] Resident aliens include all legally admitted noncitizens who are physically present within the United States. This term will be used interchangeably with the term "immigrant."

[7] Undocumented aliens are aliens whose presence in the United States is in violation of the immigration laws. For example, aliens who enter the country without inspection as well as aliens who overstay their visas (which authorize the permissible length of stay in the United States for the particular immigrant) would be undocumented aliens. A documented alien, of course, is one who has acquired legal residence in this country.

[8] From *Elliot's Debates on the Federal Constitution*, vol. 4, p. 555.

[9] See 149 U.S. 698, 740–41 (1893).

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gration and Naturalization Service, State Department, and other government officials; immigration experts; immigrants; and employers. Open meetings were held in February, June, and September of 1978 by the State Advisory Committees in New York, California, and Texas. More than 150 persons spoke at these open meetings. In November 1978 the Commission, for the first time, conducted a national hearing on civil rights in immigration. Thirty-two witnesses were either subpenaed or invited to testify at that hearing.

Because of the breadth of the American immigration system, the data gathered during the field investigations and the testimony received at the open meetings and national hearing were limited to selected issues of civil rights concern. Thus, some immigration issues of current public concern not contemplated by the original project scope are not covered by this report. One very important issue is the plight of refugees from Haiti and Cuba as well as Indochina. The Commission is deeply concerned with the processing procedure required for those persons who are seeking entry into this country as refugees. The Commission is also deeply concerned with reports that refugees residing in this country are experiencing discriminatory treatment, for, without a doubt, refugees who come to reside in the United States are entitled to the full protections afforded by the Constitution.

Although the report does not cover the problems of the refugee situation, the Commission does not wish to minimize the importance of that growing national and international concern. In fact, it is our hope and belief that the Refugee Act of 1980,[10] signed into law in March of this year, will make great strides in responding to the worldwide refugee situation and thereby reflect this Nation's humanitarian attitude as a refuge for those seeking to escape persecution, political tyranny, and other hardships.

This report is the culmination of more than 8 months of field investigations, 8 days of open meetings, and 2 days of national hearings. Although it is not a comprehensive review of the entire immigration system, the Commission hopes that this report will provide a useful overview of the more critical civil rights problems faced by persons confronted with that system of immigration law, practice, and procedure.

The report, in examining the current immigration system, also makes analogies and comparisons between immigration law enforcement and criminal law enforcement. The Immigration and Naturalization Service (INS) is a specialized agency with law enforcement functions charged with the administration and enforcement of the immigration laws of the United States.[11] In performing its statutory duties, the INS, like police agencies, uses patrol and investigative techniques to enforce the laws.[12] INS Border Patrol agents are dispersed along the American border in an attempt to discourage or apprehend persons entering the country without inspection at authorized border points, through interrogations or investigative stops and other enforcement techniques.[13] These INS officers, as do police officers, have authority to carry firearms and to use force in appropriate circumstances to perform their duties. At interior points, INS officers conduct investigations to apprehend persons residing in the United States in violation of the immigration laws by interrogating or conversing with persons who have information concerning immigration law violations, interrogating suspected violators or confronting suspects with evidence or information in their possession, and conducting surveillance activities or area control operations in communities or business establishments where immigration law violators are believed to be present.[14] In some circumstances, INS officers have statutory authority to make arrests or conduct searches without warrant.[15]

The Commission recognizes that the system for the enforcement and administration of the immigration laws is not identical to that of the criminal justice system. In fact, the deportation[16] process has been consistently characterized by the courts as a civil proceeding.[17] However, sufficient similarity exists between the immigration law enforcement system and the criminal justice system to justify comparison of certain aspects of both systems. Other studies, in examining INS practices, have recognized these similarities in comparing aspects of the two systems.[18]

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[10] Refugee Act of 1980, Pub. L. No. 96-212 (to be codified in scattered sections of 8 U.S.C.).

[11] Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §§1101-1557 (1976).

[12] For a brief description of police patrol and investigative techniques, see President's Commission on Law Enforcement and Administration of Justice, Task Force on the Police, *Task Force Report: The Police* (1967), p. 1.

[13] INS enforcement and apprehension practices are discussed in chapters 5 ("Operation Cooperation") and 6 of this report.

[14] INS area control operations and their legality are discussed in chapters 5 ("Operation Cooperation") and 6 of this report.

[15] 8 U.S.C. §1357 (1976). Of course, search and arrest powers of INS officers, like those of other law enforcement officers, are subject to the requirements of the fourth amendment to the Constitution of the United States. See chapter 6 of this report for a discussion of INS search and arrest powers.

[16] Deportation is a legal sanction under which aliens whose presence in the United States is in violation of Federal immigration laws are expelled from the country.

The report represents the findings and conclusions of the Commission with respect to the administration of justice in the enforcement of the immigration laws of the United States. It is divided into five sections.

The first section of the report discusses past and present discriminatory provisions of United States immigration laws. The second section focuses on problems in the practices and procedures of the INS and the State Department in administering the immigration laws and how those practices and procedures affect citizens, aliens, and intending immigrants.[19] The third section of the report concentrates on employer sanctions, a proposed legislative solution to the "immigration problem." In the fourth section, chapters 6 and 7 examine the constitutional rights provided to persons during the apprehension, detention, and deportation stages of the immigration expulsion process and the effect that process has on persons other than those subject to deportation. The last section of the report examines current INS complaint investigation procedures.

Some of the problems arising from the enforcement and administration of the immigration laws have been addressed by reforms instituted by Leonel Castillo, the former Commissioner of INS. But many problems remain. Those problems are summarized in the two major findings of the report: (1) the current Immigration and Nationality Act still contains discriminatory provisions, and (2) the current practices and procedures for the enforcement of that statute result in the denial of rights to American citizens and to documented and undocumented aliens.

The findings of the report are followed by the Commission's recommendations to eliminate the discriminatory provisions of law and to revise current immigration practices and procedures. These improvements in immigration law, practice, and procedure are necessary if American citizens, resident aliens, and undocumented aliens are to receive the full measure of benefits and legal protections to which they are entitled under our system of government. By adopting these changes, America's "old" immigrants can embark on a true course which furthers the traditions of our free and democratic society, not only for the alien but also for the American citizen.

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[17] The classification of deportation as a civil proceeding will be discussed in chapter 7 of this report.

[18] One example would be "A Comparison of the Bond-Setting Practices of the Immigration and Naturalization Service with that of the Criminal Courts" by Bruce D. Beaudin, who conducted the study for the Department of Justice and the INS. The findings and recommendations of that study are discussed in chapter 7.

[19] Intending immigrants are foreign nationals who desire to come to the United States to live and work. This term will be used interchangeably with the term "prospective immigrant" in this report.

DISCRIMINATION IN UNITED STATES IMMIGRATION LAWS

Chapter 1

Historical Discrimination in the Immigration Laws

The Early Years

During the formative years of this country's growth, immigration was encouraged with little restraint. Any restrictions on immigration in the 1700s were the result of selection standards established by each colonial settlement. The only Federal regulation of immigration in this period lasted only 2 years and came from the Alien Act of 1798, which gave the President the authority to expel aliens who posed a threat to national security.[1]

Immigrants from northern and western Europe began to trickle into the country as a result of the faltering economic conditions within their own countries. In Germany, unfavorable economic prospects in industry and trade, combined with political unrest, drove many of its nationals to seek opportunities to ply their trades here.[2] In Ireland, the problems of the economy, compounded by several successive potato crop failures in the 1840s, sent thousands of Irish to seaports where ships bound for the United States were docked.[3] For other European nationals, the emigration from their native countries received impetus not only from adverse economic conditions at home but also from favorable stories of free land and good wages in America.[4]

The Nativist Movements

As a result of the large numbers of Catholics who emigrated from Europe, a nativist movement began in the 1830s.[5] It advocated immigration restriction to prevent further arrivals of Catholics into this country. Anti-Catholicism was a very popular theme, and many Catholics and Catholic institutions suffered violent attacks from nativist sympathizers. The movement, however, did not gain great political strength and its goal of curbing immigration did not materialize.

Immigrants in the mid-19th century did not come only from northern and western Europe. In China, political unrest and the decline in agricultural productivity spawned the immigration of Chinese to American shores.[6] The numbers of Chinese immigrants steadily increased after the so-called Opium War, due not only to the Chinese economy, but also to the widespread stories of available employment, good wages, and the discovery of gold at Sutter's Mill, which filtered in through arrivals from the Western nations.[7]

The nativist movement of the 1830s resurfaced in the late 1840s and developed into a political party, the Know-Nothing Party.[8] Its western adherents added an anti-Chinese theme to the eastern anti-Catholic sentiment.[9] But once again, the nativist movement, while acquiring local political strength, failed in its attempts to enact legislation curbing immigration. On the local level, however, the cry of "America for Americans" often led to discriminatory State statutes that penalized certain racially identifiable groups.[10] As an example, California adopted licensing statutes for foreign miners and fishermen, which were almost exclusively enforced against Chinese.[11]

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[1] Ch. 58, 1 Stat. 570 (1798).

[2] Carl Wittke, *We Who Built America* (rev. 1964), p. 67.

[3] Ibid., pp. 129–33.

[4] Ibid., pp. 101–10.

[5] Ibid., pp. 491–97.

[6] Li Chien-nung, *The Political History of China, 1840–1928* (1956), pp. 48–49; Stanford Lyman, *Chinese Americans* (1974), pp. 4–5.

[7] Mary Roberts Coolidge, *Chinese Immigration* (1909), pp. 16–17.

[8] Wittke, *We Who Built America*, pp. 497–510.

[9] Coolidge, *Chinese Immigration*, p. 58.

[10] Ibid., pp. 69–82. Some municipalities also adopted ordinances that discriminated against Chinese. As an example, a San Francisco municipal ordinance, subsequently held unconstitutional in Yick Wo v. Hopkins, 118 U.S. 356 (1886), was enacted regulating the operation of public laundries but in practice was enforced almost exclusively against Chinese.

In the mid-1850s, the Know-Nothing Party lost steam as a result of a division over the question of slavery, the most important issue of that time.[12] The nativist movement and antiforeign sentiment receded because of the slavery issue and the Civil War. It maintained this secondary role until the Panic of 1873 struck.

Chinese Exclusion

The depression economy of the 1870s was blamed on aliens who were accused of driving wages to a substandard level as well as taking away jobs that "belonged" to white Americans. While the economic charges were not totally without basis, reality shows that most aliens did not compete with white labor for "desirable" white jobs. Instead, aliens usually were relegated to the most menial employment.[13]

The primary target was the Chinese, whose high racial visibility, coupled with cultural dissimilarity and lack of political power, made them more than an adequate scapegoat for the economic problems of the 1870s.[14] Newspapers adopted the exhortations of labor leaders, blaming the Chinese for the economic plight of the working class. Workers released their frustrations and anger on the Chinese, particularly in the West.[15] Finally, politicians succumbed to the growing cry for exclusion of Chinese.

Congress responded by passing the Chinese Exclusion Act of 1882.[16] That act suspended immigration of Chinese laborers for 10 years, except for those who were in the country on November 17, 1880. Those who were not lawfully entitled to reside in the United States were subject to deportation. Chinese immigrants were also prohibited from obtaining United States citizenship after the effective date of the act.

The 1882 act was amended in 1884 to cover all subjects of China and Chinese who resided in any other foreign country.[17] Then in 1888, another act was enacted that extended the suspension of immigration for all Chinese except Chinese officials, merchants, students, teachers, and travelers for pleasure.[18] Supplemental legislation to that act also prohibited Chinese laborers from reentering the country, as provided for in the 1882 act, unless they reentered prior to the effective date of the legislation.[19]

Senator Matthew C. Butler of South Carolina summed up the congressional efforts to exclude Chinese by stating:

> [I]t seems to me that this whole Chinese business has been a matter of political advantage, and we have not been governed by that deliberation which it would seem to me the gravity of the question requires. In other words, there is a very important Presidential election pending. One House of Congress passes an act driving these poor devils into the Pacific Ocean, and the other House comes up and says, "Yes, we will drive them further into the Pacific Ocean, notwithstanding the treaties between the two governments."[20]

Nevertheless, the Chinese exclusion law was extended in 1892[21] and 1902,[22] and in 1904 it was extended indefinitely.[23]

Although challenged by American residents of Chinese ancestry, the provisions of these exclusion acts were usually upheld by judicial decisions. For example, the 1892 act[24] mandated that Chinese laborers obtain certificates of residency within 1 year after the passage of the act or face deportation. In order to obtain the certificate, the testimony of one credible white witness was required to establish that the Chinese laborer was an American resident prior to the passage of the act. That requirement was upheld by the United States Supreme Court in *Fong Yue Ting* v. *United States.* [25]

Literacy Tests and the Asiatic Barred Zone

The racial nature of immigration laws clearly manifested itself in further restrictions on prospective immigrants who were either from Asian countries or of Asian descent. In addition to extending the statutory life of the Chinese exclusion law, the 1902 act also applied that law to American territorial possessions, thereby prohibiting not only the immigration of noncitizen Chinese laborers from "such island territory to the mainland territory," but also "from one portion of the island territory of the United States to another portion of said island territory."[26] Soon after, Japanese were restricted from free immigration to the United States by the "Gentleman's Agreement" negotiated between the respective governments in 1907.[27] Additional evidence would be provided by the prohibition of immigration from countries in the Asia-Pacific Triangle as established by the Immigration Act of 1917.[28]

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[11] Ibid., pp. 33–38, 69–74.

[12] Wittke, *We Who Built America*, pp. 509–10.

[13] As one author noted, "[b]efore the late 1870's the Chinese engaged only in such work as white laborers refused to perform. Thus the Chinese not only were noninjurious competitors but in effect were benefactors to the white laborer." S.W. Kung, *Chinese in American Life: Some Aspects of Their History, Status, Problems, and Contributions* (1962), p. 68.

[14] Carey McWilliams, *Brothers Under the Skin* (rev. 1951), pp. 101–03.

[15] Coolidge, *Chinese Immigration*, p. 188.

[16] Ch. 126, 22 Stat. 58 (1882).

[17] Ch. 220, 23 Stat. 115 (1884).

[18] Ch. 1015, 25 Stat. 476 (1888).

[19] Ch. 1064, 25 Stat. 504 (1888).

[20] 19 Cong. Rec. 8218 (1888).

[21] Ch. 60, 27 Stat. 25 (1892).

[22] Ch. 641, 32 Stat. 176 (1902).

[23] Ch. 1630, 33 Stat. 428. (1904).

[24] Ch. 60, 27 Stat. 25 (1892).

[25] 149 U.S. 698 (1893).

During this period, congressional attempts were also made to prevent blacks from immigrating to this country. In 1915 an amendment to exclude "all members of the African or black race" from admission to the United States was introduced in the Senate during its deliberations on a proposed immigration bill.[29] The Senate approved the amendment on a 29 to 25 vote,[30] but it was later defeated in the House by a 253 to 74 vote,[31] after intensive lobbying by the NAACP.[32]

In 1917 Congress codified existing immigration laws in the Immigration Act of that year.[33] That act retained all the prior grounds for inadmissibility and added illiterates to the list of those ineligible to immigrate, as a response to the influx of immigrants from southern and eastern Europe. Because of a fear that American standards would be lowered by these new immigrants who were believed to be racially "unassimilable" and illiterate, any alien who was over 16 and could not read was excluded. The other important feature of this statute was the creation of the Asia-Pacific Triangle, an Asiatic barred zone, designed to exclude Asians completely from immigration to the United States. The only exemptions from this zone were from an area that included Persia and parts of Afghanistan and Russia.

The 1917 immigration law reflected the movement of American immigration policy toward the curbing of free immigration. Free immigration, particularly from nations that were culturally dissimilar to the northern and western European background of most Americans, was popularly believed to be the root of both the economic problems and the social problems confronting this country.

The National Origins Quota System

Four years later, Congress created a temporary quota law that limited the number of aliens of any nationality who could immigrate to 3 percent of the United States residents of that nationality living in the country in 1910.[34] The total annual immigration allowable in any one year was set at 350,000. Western Hemisphere aliens were exempt from the quota if their country of origin was an independent nation and the alien had resided there at least 1 year.

The clear intent of the 1921 quota law was to confine immigration as much as possible to western and northern European stock. As the minority report noted:

> The obvious purpose of this discrimination is the adoption of an unfounded anthropological theory that the nations which are favored are the progeny of fictitious and hitherto unsuspected Nordic ancestors, while those discriminated against are not classified as belonging to that mythical ancestral stock. No scientific evidence worthy of consideration was introduced to substantiate this pseudoscientific proposition. It is pure fiction and the creation of a journalistic imagination. . . .
>
> The majority report insinuates that some of those who have come from foreign countries are non-assimilable or slow of assimilation. No facts are offered in support of such a statement. The preponderance of testimony adduced before the committee is to the contrary.[35]

Notwithstanding these objections, Congress made the temporary quota a permanent one with the enactment of the 1924 National Origins Act.[36] A ceiling of 150,000 immigrants per year was imposed. Quotas for each nationality group were 2 percent of the total members of that nationality residing in the United States according to the 1890 census.[37] Again, Western Hemisphere aliens were exempt from the quotas (thus, classified as "nonquota" immigrants). Any prospective immigrant was required to obtain a sponsor in this country and to obtain a visa from an American consulate office abroad. Entering the country without a visa and in violation of the law subjected the entrant to deportation without regard to the time of entry (no statute of limitation). Another provision, prohibiting the immigration of aliens ineligible for citizenship, completely closed the door on Japanese immigration, since the Supreme Court had ruled that Japanese were ineligible to become naturalized citizens.[38] Prior to the 1924 act, Japanese immigration had been subjected to "voluntary" restraint by the Gentleman's Agreement negotiated between the Japanese Government and President Theodore Roosevelt.

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[26] Ch. 641, 32 Stat. 176 (1902).

[27] The Gentleman's Agreement of 1907, U.S. Department of State, *Papers Relating to the Foreign Relations of the United States 1924* (1939), vol. 2, p. 339.

[28] Ch. 29, 39 Stat. 874 (1917).

[29] 52 Cong. Rec. 805 (1914).

[30] *Id.* at 807.

[31] *Id.* at 1138-39.

[32] See *Crisis,* vol. 9 (February 1915), p. 190.

[33] Ch. 29, 39 Stat. 874 (1917).

[34] Ch. 8, 42 Stat. 5 (1921).

[35] As reprinted in the legislative history of the INA [1952] U.S. Code Cong. and Ad. News 1653, 1668.

[36] Ch. 190, 43 Stat. 153 (1924).

In addition to its expressed discriminatory provisions, the 1924 law was also criticized as discriminatory against blacks in general and against black West Indians in particular.[39]

The Mexican "Repatriation" Campaign

Although Mexican Americans have a long history of residence within present United States territory,[40] Mexican immigration to this country is of relatively recent vintage.[41] Mexican citizens began immigrating to this country in significant numbers after 1909 because of economic conditions as well as the violence and political upheaval of the Mexican Revolution.[42] These refugees were welcomed by Americans, for they helped to alleviate the labor shortage caused by the First World War.[43] The spirit of acceptance lasted only a short time, however.

Spurred by the economic distress of the Great Depression, Federal immigration officials expelled hundreds of thousands of persons of Mexican descent from this country through increased Border Patrol raids and other immigration law enforcement techniques.[44] To mollify public objection to the mass expulsions, this program was called the "repatriation" campaign. Approximately 500,000 persons were "repatriated" to Mexico, with more than half of them being United States citizens.[45]

Erosion of Certain Discriminatory Barriers

Prior to the next recodification of the immigration laws, there were several congressional enactments that cut away at the discriminatory barriers established by the national origins system. In 1943 the Chinese Exclusion Act was repealed, allowing a quota of 105 Chinese to immigrate annually to this country and declaring Chinese eligible for naturalization.[46] The War Brides Act of 1945[47] permitted the immigration of 118,000 spouses and children of military servicemen. In 1946 Congress enacted legislation granting eligibility for naturalization to Pilipinos[48] and to races indigenous to India.[49] A Presidential proclamation in that same year increased the Pilipino quota from 50 to 100.[50] In 1948 the Displaced Persons Act provided for the entry of approximately 400,000 refugees from Germany, Italy, and Austria (an additional 214,000 refugees were later admitted to the United States).[51]

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[37] That act provided, however, that:

> The annual quota of any nationality for the fiscal year beginning July 1, 1927, and for each fiscal year thereafter, shall be a number which bears the same ratio to 150,000 as the number of inhabitants in continental United States in 1920 having that national origin (ascertained as hereinafter provided in this section) bears to the number of inhabitants in continental United States in 1920, but the minimum quota of any nationality shall be 100.

Ch. 190, 43 Stat. 153, 159, §11(b).

[38] Early congressional enactments restricted eligibility for naturalization to free white persons (ch. 3, 1 Stat. 103 (1790)) and to persons of African nativity or descent (Rev. Stat. §2169 (1875)). But when Congress passed the Naturalization Act of June 29, 1906 (ch. 3592, 34 Stat. 596), persons of Japanese ancestry began submitting petitions to become naturalized citizens under the procedures established by that act. The Supreme Court, however, held that the 1906 act was limited by the prior congressional enactments and thus Japanese were ineligible for naturalization. Ozawa v. United States, 260 U.S. 178 (1922).

[39] "West Indian Immigration and the American Negro," *Opportunity*, October 1924, pp. 298–99.

[40] Under the Treaty of Guadalupe Hidalgo, many Mexican citizens became United States citizens after the annexation of territory by the United States following the Mexican War. Leo Grebler, Joan W. Moore, and Ralph C. Guzman, *The Mexican American People* (1970), pp. 40–41. The Treaty of Guadalupe Hidalgo is reprinted in Wayne Moquin, *A Documentary History of the Mexican Americans* (1971), p. 183.

[41] Grebler, Moore, and Guzman, *The Mexican American People*, pp. 62–63.

[42] Ibid.

[43] Ibid., p. 64.

[44] Ibid., pp. 523–26.

[45] Moquin, *A Documentary History of the Mexican Americans*, p. 294.

[46] Ch. 344, 57 Stat. 600 (1943).

[47] Ch. 591, 59 Stat. 659 (1945).

[48] 60 Stat. 1353.

[49] Ch. 534, 60 Stat. 416 (1946).

[50] Presidential Proclamation No. 2696, [1946] U.S. Code Cong. and Ad. News 1732.

[51] Ch. 647, 62 Stat. 1009 (1948).

The McCarran-Walter Act of 1952

The McCarran-Walter Act of 1952,[52] the basic law in effect today, codified the immigration laws under a single statute. It established three principles for immigration policy:

(1) the reunification of families,

(2) the protection of the domestic labor force, and

(3) the immigration of persons with needed skills.

However, it retained the concept of the national origins system, as well as unrestricted immigration from the Western Hemisphere. An important provision of the statute removed the bar to immigration and citizenship for races that had been denied those privileges prior to that time. Asian countries, nevertheless, were still discriminated against, for prospective immigrants whose ancestry was one-half of any Far Eastern race were chargeable to minimal quotas for that nation, regardless of the birthplace of the immigrant.

"Operation Wetback"

Soon after the repatriation campaigns of the 1930s, the United States entered the Second World War. Mobilization for the war effort produced a labor shortage that resulted in a shift in American attitudes toward immigration from Mexico. Once again Mexican nationals were welcomed with open arms. However, this "open arms" policy was just as short lived as before.

In the 1950s many Americans were alarmed by the number of immigrants from Mexico. As a result, then United States Attorney General Herbert Brownell, Jr., launched "Operation Wetback," to expel Mexicans from this country. Among those caught up in the expulsion campaign were American citizens of Mexican descent who were forced to leave the country of their birth. To ensure the effectiveness of the expulsion process, many of those apprehended were denied a hearing to assert their constitutional rights and to present evidence that would have prevented their deportation. More than 1 million persons of Mexican descent were expelled from this country in 1954 at the height of "Operation Wetback."[53]

The 1965 Amendments

The national origins immigration quota system generated opposition from the time of its inception, condemned for its attempts to maintain the existing racial composition of the United States. Finally, in 1965, amendments to the McCarran-Walter Act abolished the national origins system as well as the Asiatic barred zone.[54] Nevertheless, numerical restrictions were still imposed to limit annual immigration. The Eastern Hemisphere was subject to an overall limitation of 170,000 and a limit of 20,000 per country. Further, colonial territories were limited to 1 percent of the total available to the mother country (later raised to 3 percent or 600 immigrants in the 1976 amendments). The Western Hemisphere, for the first time, was subject to an overall limitation of 120,000 annually, although no individual per-country limits were imposed. In place of the national origins system, Congress created a seven category preference system giving immigration priority to relatives of United States residents and immigrants with needed talents or skills.[55] The 20,000 limitation per country and the colonial limitations, as well as the preference for relatives of Americans preferred under the former selections process, have been referred to by critics as "the last vestiges of the national origins system" because they perpetuate the racial discrimination produced by the national origins system.

Restricting Mexican Immigration

After 1965 the economic conditions in the United States changed. With the economic crunch felt by many Americans, the cry for more restrictive immigration laws resurfaced. The difference from the 19th century situation is that the brunt of the attacks is now focused on Mexicans, not Chinese. High "guesstimates" of the number of undocumented Mexican aliens entering the United States, many of which originated from Immigration and Naturalization Service sources, have been the subject of press coverage.[56]

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[52] Ch. 477, 66 Stat. 163 (1952).

[53] Grebler, Moore, and Guzman, *The Mexican American People*, pp. 521–22. Mark A. Chamberlin *et al.*, eds., "Our Badge of Infamy: A Petition to the United Nations on the Treatment of the Mexican Immigrant," in *The Mexican American and the Law* (1974 ed.), pp. 31–34.

[54] Pub. L. No. 89-236, 79 Stat. 911 (1965).

[55] The 1965 amendments to the Immigration and Nationality Act provided the following seven category preference system:

First preference: unmarried sons and daughters of U.S. citizens. (20 percent)

Second preference: spouses and unmarried sons and daughters of lawful resident aliens. (20 percent plus any visas not required for first preference)

Third preference: members of the professions and scientists and artists of exceptional ability and their spouses and children. (10 percent)

Fourth preference: married sons and daughters of U.S. citizens and their spouses and children. (10 percent plus any visas not required for first three preferences)

Fifth preference: brothers and sisters of U.S. citizens and their spouses and children. (24 percent plus any visas not required for first four preferences)

Sixth preference: skilled and unskilled workers in occupations for which labor is in short supply in this country, and their spouses and children. (10 percent)

Seventh preference: refugees. (6 percent)

Spouses and minor children of American citizens are exempt from the preference system.

As a partial response to the demand for "stemming the tide" of Mexican immigration, Congress amended the Immigration and Nationality Act in 1976,[57] imposing the seven category preference system and the 20,000 numerical limitation per country on Western Hemisphere nations. Legal immigration from Mexico, which had been more than 40,000[58] people per year, with a waiting list 2 years long, was thus cut by over 50 percent.

Recent Revisions of the Immigrant Quota System

Although the annual per-country limitations have remained intact, Congress did amend the Immigration and Nationality Act in 1978 to eliminate the hemispheric quotas of 170,000 for Eastern Hemisphere countries and 120,000 for Western Hemisphere countries. Those hemispheric ceilings were replaced with an overall annual worldwide ceiling of 290,000.[59]

In 1980 the immigrant quota system was further revised by the enactment of the Refugee Act. In addition to broadening the definition of refugee, that statute eliminated the seventh preference visa category by establishing a separate worldwide ceiling for refugee admissions to this country. It also reduced the annual worldwide ceiling for the remaining six preference categories to 270,000 visas, and it increased the number of visas allocated to the second preference to 26 percent.[60]

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[56] "6–8 million," *New West Magazine,* May 23, 1977; "4–12 million," *Los Angeles Times,* Aug. 7, 1977.

[57] Pub. L. No. 94–571, 90 Stat. 2703 (1976).

[58] In 1976 there were 57,863 immigrants from Mexico; in 1975, 62,205. U.S., Immigration and Naturalization Service, *Annual Report 1976,* p. 89.

[59] Pub. L. No. 95–412, 92 Stat. 907 (1978).

[60] Refugee Act of 1980, Pub. L. No. 96–212 (to be codified in scattered sections of 8 U.S.C.). The Refugee Act also increased the allocation of refugee visas to 50,000 annually for the first three fiscal years under the statute and provided that the number of refugee admissions in the following years would be determined by the President after consultation with Congress.

Chapter 2

Present Discrimination in the Immigration Laws

The repeal of the national origins system in 1965 was intended to abolish all discrimination in the selection of immigrants to the United States on the basis of their race or national origin. To replace a system widely acknowledged to be racially discriminatory, all intending immigrants were to have an equal opportunity to enter the U.S. on a first-come, first-served basis "without regard to place of birth."[1] Although the current immigrant selection system purports on its face to treat all persons equally, the system has been criticized as having a discriminatory effect because of the imposition of annual per-country limitations of 20,000 immigrants and colonial quotas of 600 visas. As one experienced immigration practitioner concluded:

> Our national antidiscrimination policies and the constitutional safeguards which ensure them, however, have bypassed our immigration laws. They remain a disgraceful relic of the past nurtured in the mouldy miasma of unfounded prejudice, bias, and racial discrimination. . . .
>
> These discriminations between. . .colonial subquotas and national quotas are indefensible classifications based upon race, national origins, place of birth and prejudice. However, they have been sustained by the courts and represent our national policy—a policy in conflict with our national antidiscrimination declarations and attitudes.
>
> We can retain an annual worldwide ceiling of 290,000[*] but discrimination based upon age, national quotas, quotas based upon place of birth and colonial quotas are neither needed nor in keeping with modern concepts of equality and fairness. They represent a relic of prejudice and a bygone era. They should be eliminated.[2]

Per-Country Limits

Prior to the adoption of a single annual worldwide ceiling in 1978,[3] the 1965 amendments to the McCarran-Walter Act repealed the national origins quota system for the selection of immigrants to the United States and limited the number of immigrants for any given year from the Eastern Hemisphere to 170,000, with no more than 20,000 visas going to each country in the Eastern Hemisphere.[4] Immigration from the Western Hemisphere, which had not been previously restricted, was to be limited as of July 1968 to 120,000 annually, although no per-country limits were imposed.[5] It is interesting to note that during the decade preceding the imposition of these restrictions upon Western Hemisphere immigration, the number of Mexican immigrants steadily increased and began to overtake Canadian immigra-

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[1] S. Rep. No. 748, 89th Cong., 1st sess., reprinted in [1965] U.S. Code Cong. & Ad. News 3328, 3332.

[*] The annual worldwide ceiling for nonrefugee immigrants was reduced to 270,000 in 1980. Refugee Act of 1980, Pub. L. No. 96-212 (to be codified in scattered sections of 8 U.S.C.).

[2] Jack Wasserman, statement submitted to the U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 14–15, 1978, pp. 2, 6–7.

[3] Pub. L. No. 95–412, 92 Stat. 907 (1978).

[4] The per-country limits were to be imposed gradually, as the national origins quota system would not be officially abolished until July 1, 1968. In the interim, those quota numbers under the existing quota system that were unused at the end of the year would be reallocated to countries with oversubscribed quotas and long preference waiting lists. S. Rep. No. 748, 89th Cong., 1st sess., reprinted in [1965] U.S. Code Cong. & Ad. News 3328, 3329, 3333.

[5] By imposing this 120,000 quota, Congress intended to place immigrants from both hemispheres on an equal footing in terms of access to the U.S.

> The committee has been increasingly concerned with the unrestricted flow of immigration from the nonquota countries (Western Hemisphere) which averaged approximately 110,000 admissions [per year] over the past ten years. . .to continue unrestricted immigration for persons born in the Western Hemisphere countries is to place such aliens in a preferred status compared to aliens born in other parts of the world. . . .

Id. at 3336.

TABLE 2.1

Canadian and Mexican Immigration to the United States, 1920-70*

	Canada	Mexico
1920-30	1,014,540	511,648
1931-40	108,527	22,319
1941-50	171,718	60,589
1951-60	377,952	299,811
1961-70	413,310	453,937

Note: Total immigration to the United States from Western Hemisphere countries for this period was 31,191,167.
*Years ending June 30.

Source: U.S., Department of Justice, Immigration and Naturalization Service, *1976 Annual Report*, pp. 87-88. The figures for Canadian and Mexican immigration were extracted from table 13.

tion to the United States, although the number of Mexican immigrants entering the United States in the 1960s did not even approximate the number of Canadian immigrants who had entered in the 1920s (see table 2.1).

The per-country limits imposed by the new system were intended to correct the discriminatory immigration policies inherent in the national origins quota system by providing that all intending immigrants be treated equally regardless of their place of origin. The numerical limits on each country officially were intended only to "prevent an unreasonable allocation of visa numbers to any one foreign state."[6] By imposing per-country quotas on the number of immigrants rather than allowing unrestricted migration within the hemispheric limitation (and within the worldwide ceiling after 1978), the new system has perpetuated the distinctions drawn by previous immigration laws between intending immigrants on the basis of their country of origin. Where a United States citizen, the intended beneficiary of the immigration laws, seeks to immigrate members of his or her family who are not able to enter the United States for long periods of time because of the quotas, that citizen correspondingly also suffers because of his or her national origin.

Under the previous national origins system, the number of immigrants from any country in a given year was limited to a small percentage of the total number of persons of that nationality already residing in the United States. This meant that immigration from countries such as China, Japan, and others in the Asia-Pacific Triangle, which had been subject to strict exclusionary laws for several decades, was severely restricted under the national origins system, as there were few Asians already present in the United States to serve as the base population for computing quotas. To minimize in part the racially discriminatory effects of the national origins system, Congress allowed a greater number of Asians to enter the United States than would otherwise have entered under the quotas imposed by law. For example, because the 1952 act limited immigration from any country to one-sixth of 1 percent of that country's population present in America according to the 1920 census,[7] the annual quota of Chinese immigrants who could enter the United States would have been less than the guaranteed minimum quota of 105.

The result of the national origins system was to deny the opportunity to immigrate to those persons from countries whose base populations in the United States were sparse because of prior restrictions on their immigration. On the other hand, those countries in northern and western Europe that had previously enjoyed unrestricted immigration to the United States had large base populations and therefore were entitled to substantial quotas under the national origins formula. Ireland, for example, had a quota of 17,756 and Germany had a quota of 25,814, while quotas for countries such as China (100), Japan (185), the Philippines (100), and the Pacific Islands (100) were negligible.[8] Immigration statistics demonstrate that, in the decades immediately following enactment of the national origins quotas, the demand for visas in Germany and Ireland did not reach the allowable ceiling.[9]

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[6] *Id.* at 3332.

[7] Ch. 477, 66 Stat. 163, §202(e).

[8] H. R. Rep. No. 1365, 82d Cong., 2d sess., reprinted in [1952] U.S. Code Cong. & Ad. News 1681.

Enactment of the per-country limitations of 20,000 in 1965 to replace the national origins quotas was intended in part to provide some relief for countries with long waiting lists but also served to protect those countries that had benefited under the previous system.

> Due to the existence of backlogs of applicants in those nations discriminated against by the national origin system, an annual limitation per country of 20,000 quota immigrants is established, so that in the short run, no one nation will be able to receive an unduly disproportionate share of the quota numbers.[10]

While this new system for selecting immigrants purports to abolish prior discriminatory policies and to treat immigrants from every country equally, the imposition of a uniform quota has a demonstrably disproportionate impact based upon an immigrant's country of origin. Analysis of statistical data on immigration shows that the 20,000 per-country limit far exceeds the demand for visas from northern European countries, while Asian countries consistently utilize all their available visas and still have long waiting lists, composed primarily of close relatives of United States citizens seeking visas to enter the country.

Table 2.2 demonstrates the recent decline in the number of European immigrants as contrasted with the increase in the number of Asian immigrants. Between 1975 and 1976, for example, Asian immigration increased by 9 percent while European immigration decreased by 4 percent.[11] In 1976 no European country reached the per-country limit of 20,000 visas; Portugal came closest by sending 9,309 of its citizens to America, while at the other end of the spectrum only 162 Austrians immigrated to the United States. In Asia, on the other hand, both Korea and the Philippines reached the ceiling of 20,000, while immigrants from India and China numbered 16,642 and 14,402, respectively.[12] In 1974 the Visa Office reported that, under the numerically limited classes, "58% of the Eastern Hemisphere numbers were used by natives of six countries—Korea (19,831), Philippines (19,675), China (18,901), India (12,575), Italy (13,925), and Portugal (10,679)."[13] From these statistics, it is apparent that persons from countries that had been excluded by past immigration laws are adversely affected by the per-country limitations, and because of the large number of backlogged petitions, they are now required to wait for visas.

Passage of the 1976 amendments imposing the per-country limits upon Western Hemisphere countries had a similarly restrictive effect upon immigration from Mexico. The avowed intent of this legislation was to prevent the unequal treatment of intending immigrants on the basis of national origin by imposing a uniform limitation of 20,000 on immigration from every country in both Eastern and Western Hemispheres. As expressed in a May 1976 joint statement of the Departments of Justice and State delivered before the House Judiciary Committee:

> Based on a review of existing data, a uniform ceiling for each country. . .would be preferable. This would permit an equitable distribution of immigration from throughout the hemisphere and from throughout the world. Problems with illegal immigration will exist whether immigration from Mexico is limited to 20,000 or 35,000 per year or not at all. While permitting 35,000 immigrants a year from Mexico would ease their demand slightly, this would only increase the waiting lists and the demand throughout the rest of the hemisphere (1976 Hearings, pp. 362–363).[14]

The immediate effect of this act was to cut Mexican immigration, which was measured at 39,459[15] for fiscal year 1976,[16] in half by imposing the 20,000 limit, thereby creating an immediate shortage of immigrant visas and a long waiting list for those visas that are available. Other Western Hemisphere countries were not similarly affected, as their de-

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[9] During the decade 1931–40, immigration from Ireland only reached 13,167 (the Irish quota was 170,000) and German immigration was only 114,058 (its quota was 250,000), while during 1941–50 Irish immigration only reached 26,967 and German immigration was only 226,578. U.S., Immigration and Naturalization Service, *Annual Report 1976*, p. 87.

[10] 111 Cong. Rec. 24226 (1965) (remarks of Senator Edward Kennedy).

[11] INS, *Annual Report 1976*, p. 7.

[12] Ibid., p. 44. These statistics have been extracted from table 6.

[13] U.S., Department of State, Bureau of Security and Consular Affairs, *Report of the Visa Office* (1974), pp. 8–9. These numbers represent those immigrants subject to numerical limitations.

Prior to the passage of Pub. L. No. 95–412, 92 Stat. 907 (1978), which established a worldwide ceiling on immigration to the United States, visa numbers were allocated within two hemispheric ceilings. Countries whose visa numbers were counted against the Western Hemisphere ceiling included the independent nations of North and South America. Visas for all other countries were counted against the Eastern Hemisphere total.

[14] H. R. Rep. No. 94–1553, 94th Cong., 2d sess. 9, reprinted in [1976] U.S. Code Cong & Adm. News 6081.

[15] INS, *Annual Report 1976*, p. 44. This number represents those immigrants subject to numerical limitations.

[16] The act's provisions were to take effect on Jan. 1, 1977.

TABLE 2.2

Immigrants Admitted to the United States by Country or Region of Birth, 1967-76*

	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976
All countries	361,972	454,448	358,579	373,326	370,478	384,685	400,063	394,861	386,613	398,613
Europe	137,301	137,754	118,028	116,039	96,506	89,993	92,870	81,212	73,996	72,411
Asia	61,446	58,989	75,679	94,883	103,461	121,058	124,160	130,662	132,469	149,881
Africa	4,236	5,078	5,876	8,115	6,772	6,612	6,655	6,182	6,729	7,723
Oceania	2,328	2,588	2,639	3,198	2,923	3,286	3,255	3,052	3,347	3,591
North America	140,138	228,060	132,426	129,114	140,114	144,375	152,788	151,444	146,668	142,307
South America	16,517	21,976	23,928	21,973	20,700	19,359	20,335	22,307	22,984	22,699
Others	6	3	3	4	2	2	—	2	1	1

*Years ending June 30.

Source: U.S., Department of Justice, Immigration and Naturalization Service, *1976 Annual Report*, p. 89, extracted from table 14.

mands were easily satisfied by the 20,000 per-country limit.[17]

Colonial Quotas

The quotas imposed by the McCarran-Walter Act of 1952 limited immigration into the United States from any colony to 100 persons each year, chargeable to the mother country's limit, unless a separate quota was established. Of the very few separate quotas created, none exceeded the limit of 100 immigrants otherwise provided. The stated intent for imposing these quotas was to "prevent undue absorption of a governing country's quota by a colony or dependency and [to] preclude colonies or dependencies from having greater preferences than the independent countries which are entitled to minimum quotas."[18]

From the time of their enactment, these quotas were perceived as operating in a racially discriminatory manner, primarily against intending immigrants from the British West Indies. In its 1953 report, the President's Commission on Immigration found that enactment of these colonial quotas "has generally been regarded as discriminatory against the colored people of the Caribbean area,"[19] and the Secretary of State noted that the British West Indies would, in fact, be adversely affected.

> In the colonial and other dependent areas, an even less satisfactory situation has come into being. The new Act provides that colonies shall have quotas of 100 each, instead of unlimited use of the quota of the governing country. The difficulties are most clearly evident in the important strategic area of the Caribbean. The fact that this area has been the only part of the Western Hemisphere subject to quotas has always been an unpleasant irritant to these colonial peoples. In the case of the British West Indies, the large and always undersubscribed British quota was open to them. They have not, therefore, felt the practical effects of the discrimination implicit in their unique status in the Hemisphere. No more than 2,500 immigrants have entered the United States from the British West Indies in any one year. Henceforth, however, no more than 800 (100 for each of the 8 British territories) may enter each year.[20]

Foreshadowing the consequences of the enactment of the per-country limits, imposition of these quotas cut colonial immigration by two-thirds in the British Indies and created long waiting lists for U.S. immigrant visas.

Since 1952, however, changes in the immigration laws have left these quotas virtually undisturbed. The 1965 amendments increased the colonial allotments to 1 percent (or 200) of the per-country limits in the Eastern Hemisphere, while the 1976 laws increased the quotas to 600 for all dependencies. While the 1976 increase was intended to alleviate the large backlogs of applicants in Hong Kong and other Eastern Hemisphere dependencies, which totaled 23,510 as of January 1, 1976,[21] long waiting lists for immigrant visas still exist in some colonial areas, most notably Hong Kong.

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[17] INS, *Annual Report 1976*, p. 44. During fiscal year 1976, demands for visas in all other Western Hemisphere countries were well under 20,000 except in Cuba; a large number of Cubans were able to immigrate under the Cuban Refugee Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161(1966). Ibid., p. 12.

[18] H.R. Rep. No. 1365, 82d Cong., 2d sess., reprinted in [1952] U.S. Code Cong. & Adm. News 1689, 1690-91.

[19] U.S., President's Commission on Immigration and Naturalization, *Whom Shall We Welcome* (1953), p. 88.

[20] Ibid.

[21] H. R. Rep. No. 94-1553, 94th Cong. 2d sess. 9, reprinted in [1976] U.S. Code Cong. & Adm News 6081.

TABLE 2.3

Availability of Immigrant Visas to the United States, February 1979

Foreign state	*Preference						Non-preference
	1st	2nd	3rd	4th	5th	6th	
All foreign states and dependency areas other than below	C	C	C	C	7-1-78	C	U
China	C	C	C	C	6-8-78	3-1-78	U
India	C	C	1-1-75	C	5-22-78	C	U
Korea	C	C	C	C	9-8-77	C	U
Mexico	C	1-1-70	C	11-22-77	9-1-77	C	U
Philippines	C	6-15-77	10-15-69	10-22-72	2-22-69	2-22-78	U
Anguilla	C	C	C	C	7-1-78	5-15-77	U
Antigua	C	1-12-78	C	C	2-1-75	5-17-77	U
Belize	C	6-15-77	C	C	6-22-74	3-1-78	U
Hong Kong	C	9-1-75	6-1-69	12-15-73	11-15-67	4-15-76	U
St. Christopher-Nevis	C	1-1-78	C	C	7-1-74	3-15-68	U
St. Lucia	C	C	C	C	7-1-78	5-1-70	U
St. Vincent	C	C	C	C	7-1-78	1-1-77	U

*C—Current available
U—Unavailable
Dates—Priority dates for oversubscribed visas.
Source: U.S., Department of State, *Visa Bulletin* (February 1979).

Present Effects of the Per-Country Limits and Colonial Quotas

To the extent that they operate to exclude persons from certain countries while admitting persons with identical preference status from other countries solely on the basis of the country of origin, the current per-country limits and colonial quotas have a discriminatory impact. Many countries or dependencies, such as the Philippines or Hong Kong, with large backlogs caused by the previous restrictive immigration laws, quickly fill their annual quotas. Their waiting lists continue to grow because the number of applicants greatly exceeds the numerical ceiling allowed by law, while the demand for visas in other countries, such as Great Britain, does not even approach the 20,000 ceiling. The effect of this inequality, as shown in table 2.3, is to subject intending immigrants from certain countries and dependent territories to long waits for visas while immigrants from other countries can immediately obtain them.

As of February 1979, visas were available in every preference category except the fifth preference to all applicants from Europe and other countries not specifically listed in table 2.3, while countries such as Mexico and the Philippines and dependencies such as Hong Kong were oversubscribed in most of their preference categories. Under this system a sixth preference applicant from England, who might be merely an immigrant worker, would be able to enter the United States immediately, while the families of legal residents must wait 9 years in Mexico, and the married children of United States residents must wait 7 years in the Philippines. The primary purpose of the immigration law, the reunification of families, is not fully met where families of United States residents and citizens must wait nine times as long to enter the United States as persons who merely wish to work in America.

The law's stated intent of providing equal access to the United States without regard to place of birth is also not fulfilled through the operation of the per-country limits and colonial quotas. As table 2.3 demonstrates, applicants are, in fact, treated differently on the basis of their place of origin. Brothers and sisters of United States citizens who wish to immigrate from England need wait only 6 months, while brothers and sisters who wish to immigrate from Hong Kong must wait 12 years, a period 24 times as long (as of February 1979).

Finding and Recommendation

Finding 2.1: The immigrant selection system under the current Immigration and Nationality Act has a discriminatory impact on prospective immigrants from certain countries or dependencies and thus results in the denial or delayed receipt of benefits under that statute for American citizens and resident aliens.

The effect of the per-country limits and colonial quotas under the Immigration and Nationality Act has been to subject intending immigrants from certain countries or dependencies, particularly those countries or dependencies that had previously been disfavored by United States immigration laws, to delays of up to 12 years (as of February 1979) for visas while immigrants from other countries can obtain visas immediately. Repeal of the national origins quota system and the enactment of the 1965 amendments to the McCarran-Walter Act were designed to afford all intending immigrants an equal opportunity to enter the United States on a first-come, first-served basis without regard to their race or national origin. But instead of eliminating the discrimination caused by the national origins system, these numerical limitations operate to maintain a proportional representation of immigrants from various countries similar to that which existed in the United States prior to 1965.

The colonial quotas have had the effect of limiting the immigration of natives of colonial areas on the basis of their race. Although they have been denounced as discriminatory both in intent and in operation, these quotas still exist and are enforced today. The imposition of per-country limitations on the number of immigrants rather than allowing unrestricted migration within the worldwide ceiling has perpetuated the built-in discriminatory effects of previous immigration laws that distinguished among intending immigrants on the basis of their country of origin. Where the intended beneficiary of a relative preference is a United States citizen or resident alien, that American resident correspondingly suffers discrimination on the basis of national origin.

The purpose and intent of the immigration laws are being frustrated by the present annual per-country limitations of 20,000 immigrant visas and colonial quotas of 600 immigrant visas. First, it is apparent that applicants are not being given priority strictly according to their date of filing and "without regard to their place of birth." Persons from certain countries must wait 8 to 10 years to obtain visas, while persons within the same preference category but from other countries can obtain visas immediately. Second, the variance in waiting periods frustrates the Immigration and Nationality Act's primary purpose—the reunification of families. For example, the brothers of United States citizens who seek to immigrate from the Philippines must wait many years, whereas brothers of United States citizens who wish to migrate from Britain can obtain visas after waiting only 6 months.

Recommendation 2.1: Congress should amend the Immigration and Nationality Act to eliminate the per-country numerical limitations and the colonial quotas and provide for admission within the annual worldwide ceiling of 270,000 on a first-come, first-served basis in accord with the existing six preference categories.

The decision as to the number of visas to be granted annually is a political decision to be made by Congress. The Commission's concern is only with the nondiscriminatory application of that visa policy once the number of visas is decided by Congress.

If United States immigration laws are to be successful in providing an equal opportunity to all intending immigrants, regardless of their ancestry or place of birth, and in promoting the reunification of families, the current discriminatory system of numerical quotas on the number of immigrants from each country and dependent territory must be abolished.

Abolition of the per-country limitations and colonial quotas would ensure that all persons are treated equally under the laws and would only subject applicants to the worldwide ceiling of 270,000 immigrant visas and the existing six category preference system which allocates visas in the following manner:

First preference: unmarried sons and daughters of United States citizens (20 percent of the annual worldwide ceiling);

Second preference: spouses and unmarried sons and daughters of lawful resident aliens (26 percent plus any visas not required for the first preference);

Third preference: members of the professions and scientists and artists of exceptional ability and their spouses and children (10 percent);

Fourth preference: married sons and daughters of United States citizens and their spouses and children (10 percent plus any visas not required for the first three preferences);

Fifth preference: brothers and sisters of United States citizens and their spouses and children (24 percent plus any visas not required for the first four preferences); and

Sixth preference: skilled and unskilled workers in occupations for which labor is in short supply in this country, and their spouses and children (10 percent);

This would enable all prospective immigrants to obtain visas based strictly on their priority date, first-come, first-served, without consideration of their country of origin. Although the elimination of these numerical limitations would initially allow certain countries to obtain more than the 20,000 visas currently available because of their already extensive waiting lists, this system, as demonstrated in the appendix to this report, would allow all American citizens and residents an equal opportunity to be reunited with their close relatives abroad, whether they come from Mexico or Hong Kong or Ireland. Thus, the country of origin of intending immigrants and their United States relatives would no longer be considered in determining the length of the waiting period for visas.

THE IMMIGRATION PROCESS

Chapter 3

Service and Adjudications Functions of the Immigration and Naturalization Service

The Immigration and Naturalization Service has two major functions by law: first, to administer the immigration laws by assisting those who wish to immigrate or those who are already in the United States and wish to remain and, second, to enforce the immigration laws by preventing illegal migration into the United States and by expelling those who have entered and do not have a legal right to remain.

As part of its administrative and service responsibilities, INS provides information to the public about immigration benefits provided by law, accepts applications and petitions from those seeking to avail themselves of these benefits, and determines whether benefits will be granted or denied in each case. This chapter will discuss these functions, the *service* functions, of INS and will focus on the problems that currently exist in the public's encounters with INS, in the effect of the processing backlog, and in the adjudication of petitions submitted to INS. This chapter will also examine the conflicting missions of INS—service and enforcement—and the effect that role conflict has on its service function. Chapter six of this report will discuss INS enforcement responsibilities and the problems arising out of many of its current enforcement practices.

Before discussing service and enforcement operations, however, it is appropriate to examine briefly the Service's employment profile.[1]

INS Employment Profile

Civil Rights Commission staff prepared an analysis and report of the overall employment picture at INS in 1978. The report was based on statistics and data provided by the Equal Employment Opportunity Branch, Personnel Division, of the INS Central Office, and reflected the most current employment figures available as of September 1978.[2] The report analyzes the work force composition of INS at three major levels: agencywide, the Central Office, and the regional offices. The analysis of the work force was limited, however, to those jobs and positions within the General Schedule (GS) pay system[3] and presents a profile of current INS employment practices; no attempt has been made to analyze statistics from previous years to determine the degree of success INS has had in meeting its equal employment opportunity responsibilities.[4] The Commission analysis found:

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[1] In both its service and enforcement responsibilities, INS comes into contact repeatedly with minority communities and persons from other countries. INS service officers provide information daily to persons from many nations and process their applications for benefits, as well as help U.S. citizens of Hispanic, Asian and Pacific, and European origin to bring close relatives into the United States. INS enforcement officers have occasion to interrogate persons of various racial and ethnic backgrounds, U.S. citizens and aliens alike, and process persons from many countries for deportation. One study has noted that, in order to perform its duties more effectively and efficiently, and to reduce stereotyping and prejudice, a law enforcement agency should employ a significant number of minority-group employees. The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967), pp. 167, 174.
Testimony presented before this Commission similarly suggests that the presence of a substantial number of minority employees on the INS work force can increase the Service's understanding of different minority groups and their particular problems, as well as increase public confidence in the ability of INS to perform its duties responsibly and responsively. See later discussion on "Obtaining Information from INS" in this chapter.

[2] U.S., Commission on Civil Rights, Staff Report, "The Immigration and Naturalization Service: An Employment Profile" (November 1978), p. 3 (hereafter cited as "Employment Profile."). The report in its entirety was introduced into the record of the Commission's Washington hearing on immigration. See U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 14–15, 1978, vol. II: Exhibits, pp. 43–166.

[3] The General Schedule (GS) pay system in the Federal Government basically applies to white-collar or professional level jobs. The other major Federal pay system, the Wage Board (WB), generally covers blue-collar or skilled craft occupations. Slightly over 11,100 persons, or nearly 96 percent, of the total INS work force were employed in the GS pay system. Ibid., pp. 4–5.

- As of September 1978, members of minority groups were slightly more than 28 percent of the INS total GS work force. Approximately 11.8 percent of these employees were black, 13.6 percent were Hispanic, 0.1 percent were American Indian, and 2.5 percent were Asian American.[5] (See table 3.1.)
- Women employees constituted approximately 35.5 percent of the total GS work force; of this number, 40.4 percent were also members of minority groups. Approximately 24.3 percent of INS female employees were black, 12.3 percent were Hispanic, 0.2 percent were American Indian, and 3.6 percent were Asian American.[6] (See tables 3.1 and 3.2.)
- Although minorities were more than 28 percent of the total INS work force, the great majority (74 percent) were employed at or below the GS-8 level, while a sizable number (32 percent) of minority employees were at or below the GS-4 level. In contrast, less than half (46.4 percent) of all white employees were at or below the GS-8 level, and only a fraction (13 percent) of the white work force was at or below the GS-4 level. White employees dominated the top ranks of the pay scale, however, with more than 15 percent of the white work force employed at or above the GS-12 level,[7] compared to merely 3 percent of all minority employees at this same level. (See table 3.3.)
- Although a large fraction of the INS work force is female, most women workers (88.3 percent) were employed at or below the GS-8 level; only 2 percent were at or above the GS-12 level. In comparison, 17 percent of all male employees were at or above the GS-12 level.[8] (See table 3.3.)
- The median grade level at which minorities and women were employed (GS-4.5) was four grade levels below the overall white median level (GS-8.5).[9] (See table 3.4.)
- Minority and women employees appeared to have little or no participation in policy formulation and decisionmaking within INS, particularly at the midmanagement level between GS-9 and GS-12. A small percentage of all minority (9.6 percent) and female (5.9 percent) employees were at or above the GS-9 level, while almost 32 percent of the white work force was at or above this level. White employees also dominated the upper management and supervisory levels, occupying 92.7 percent of all jobs at or above the GS-12 level, compared to a small number of all minorities (7.2 percent) and females (6.8 percent) at this level.[10] (See table 3.4.)
- Approximately 18 percent of all INS employees earned less than $12,208 annually; nearly 32 percent of all minority employees and 40 percent of all female employees fell into this category, while only 13 percent of all white employees earned less than this salary. At the other end of the pay scale, however, more than 15 percent of the white work force earned in excess of $23,087 annually, while only 3 percent of the minority employees and only 2 percent of the female employees fell into this category.[11] (See table 3.5.)
- Within INS, the four job categories of general clerical, investigator, inspector, and patrol officer comprised more than 60 percent of the total agency work force. Although minorities were heavily represented (44 percent) in the general clerical jobs, they filled only 12 percent of the investigator positions, 19 percent of the inspector jobs, and 19 percent of the patrol officer slots.[12] (See table 3.6.)
- Female employees were mainly concentrated in clerical jobs, filling 90 percent of all stenographer, secretary, and clerk-typist positions. In the four major job categories, women held approximately 42 percent of the general clerical jobs, but only 4 percent of the investigator positions, 23 percent of the inspector jobs, and less than 1 percent of the patrol officer slots.[13] (See table 3.6.)

Because INS has had an affirmative action program for several years,[14] minorities and women constitute a significant portion of the total INS work force, but tend to be concentrated in occupations at the lower grade and salary levels. As a result,

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[4] "Employment Profile," p. 44.
[5] Ibid.
[6] Ibid.
[7] Ibid., p. 45.
[8] Ibid.
[9] Ibid.
[10] Ibid. See also table 1B in the appendix to the "Employment Profile."
[11] Ibid.
[12] Ibid., p. 46.
[13] Ibid.
[14] INS also has recently implemented an upward mobility program designed to provide increased job opportunities for minority employees. James Walker, INS Assistant Commissioner for Personnel, testimony before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 14-15, 1978, pp. 52-54 (hereafter cited as Washington Hearing Transcript).

TABLE 3.1

Immigration and Naturalization Service Work Force* by Grade Level, Race, Ethnicity, and Sex, Percentage Distribution (Horizontal), September 1978

Grade	Salary range	Black	Hispanic	Native American**	Asian American	Total minority group	White/Anglo	Total	Male	Female
2	$ 7,422– 9,645	40.1%	6.1%	0.0%	0.0%	46.2%	53.8%	100.0%	20.5%	79.5%
3	8,356–10,877	36.5	14.6	0.0	1.0	52.1	47.9	100.0	20.5	79.5
4	9,391–12,208	26.7	17.2	0.2	2.2	46.3	53.7	100.0	24.3	75.7
5	10,507–13,657	11.1	14.5	0.1	5.4	31.0	69.0	100.0	51.0	49.0
6	11,712–15,222	16.1	19.5	0.0	6.2	41.9	58.1	100.0	50.2	49.8
7	13,014–16,920	13.2	14.2	0.3	3.5	31.2	68.8	100.0	56.6	43.4
8	14,414–18,734	13.1	17.2	0.0	4.0	34.3	65.7	100.0	56.6	43.4
9	15,920–20,699	2.8	18.0	0.2	1.5	22.5	77.5	100.0	89.7	10.3
10	17,532–22,788	3.4	6.9	0.0	6.9	17.2	82.8	100.0	93.1	6.9
11	19,263–25,041	4.9	8.1	0.1	0.5	13.6	86.4	100.0	90.5	9.5
12	23,087–30,017	3.0	4.6	0.2	0.4	8.1	91.9	100.0	93.2	6.8
13	27,453–35,688	2.8	3.5	0.3	0.3	6.9	93.1	100.0	92.7	7.3
14	32,442–42,171	2.0	3.1	0.0	0.3	5.4	94.6	100.0	92.2	7.8
15	38,160–49,608	2.1	6.4	0.0	0.7	9.3	90.7	100.0	95.7	4.3
16	44,756–56,692	0.0	0.0	0.0	0.0	0.0	100.0	100.0	100.0	0.0
17	52,429–59,421	0.0	0.0	0.0	0.0	0.0	100.0	100.0	100.0	0.0
18	61,449–	0.0	0.0	0.0	0.0	0.0	100.0	100.0	100.0	0.0
Total		11.8%	13.6%	0.1%	2.5%	28.1%	71.9%	100.0%	64.5%	35.5%

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*General Schedule work force.

**Includes Aleuts and Eskimos.

Source: U.S., Department of Justice, Immigration and Naturalization Service, "INS Minorities by Minority Group Designator Within Series" (Personnel Systems, Washington, D.C.: September 1978), cited in U.S., Commission on Civil Rights, staff paper, "The Immigration and Naturalization Service: An Employment Profile" (November 1978), p. 52.

TABLE 3.2

Immigration and Naturalization Service Female Work Force* by Grade Level, Race, and Ethnicity, Percentage Distribution (Horizontal), September 1978

Grade	Salary range	Black	Hispanic	Native American**	Asian American	Total minority group	White/Anglo	Total
2	$ 7,422– 9,645	43.8%	5.7%	0.0%	0.0%	49.5%	50.6%	100.0%
3	8,356–10,877	36.8	13.6	0.0	1.0	51.3	48.7	100.0
4	9,391–12,208	28.4	14.0	0.1	2.1	44.7	55.3	100.0
5	10,507–13,657	17.0	12.7	0.2	4.9	34.7	65.3	100.0
6	11,712–15,222	19.6	8.7	0.0	5.3	33.6	65.4	100.0
7	13,014–16,920	22.5	12.7	0.3	3.8	39.3	60.7	100.0
8	14,414–18,734	18.6	0.0	0.0	7.0	25.6	74.4	100.0
9	15,920–20,699	14.0	14.9	0.4	9.4	38.7	61.3	100.0
10	17,532–22,788	0.0	0.0	0.0	50.0	50.0	50.0	100.0
11	19,263–25,041	29.1	6.4	0.7	1.4	37.6	62.4	100.0
12	23,087–30,017	13.5	8.8	0.0	2.7	24.3	75.7	100.0
13	27,453–35,688	8.7	8.7	0.0	0.0	17.4	82.6	100.0
14	32,442–42,171	8.7	8.7	0.0	0.0	17.4	82.6	100.0
15	38,160–49,608	16.7	33.3	0.0	0.0	50.0	50.0	100.0
16	44,756–56,692							
17	52,429–59,421							
18	61,449–							
Total		24.3%	12.3%	0.2%	3.6%	40.3%	59.7%	100.0%

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*General Schedule work force.

**Includes Aleuts and Eskimos.

Source: U.S., Department of Justice, Immigration and Naturalization Service, "INS Minorities by Minority Group Designator Within Series" (Personnel Systems, Washington, D.C.: September 1978), cited in U.S., Commission on Civil Rights, staff paper, "The Immigration and Naturalization Service: An Employment Profile" (November 1978), p. 55.

TABLE 3.3

Immigration and Naturalization Service Work Force,* Grade Level Groupings by Race, Ethnicity, and Sex, September 1978

Grade group	Black No.	Black %	Hispanics No.	Hispanics %	Native American No.	Native American %	Asian American No.	Asian American %	Total minority No.	Total minority %	White/Anglo No.	White/Anglo %	Male No.	Male %	Female No.	Female %
GS 01–04	650	49.4	311	20.6	2	15.4	31	10.9	994	31.9	1,038	12.9	454	6.4	1,578	39.9
GS 05–08	494	37.6	612	40.7	4	30.8	203	71.9	1,313	42.1	2,677	33.5	2,079	28.9	1,911	48.4
GS 09–11	139	10.5	533	35.2	5	38.5	44	15.5	721	23.0	3,075	38.4	3,418	47.7	378	9.5
GS 12–15+	34	2.5	54	3.5	2	15.3	5	1.7	95	3.0	1,220	15.2	1,226	17.0	89	2.2
Total	1,317	100.0	1,510	100.0	13	100.0	283	100.0	3,123	100.0	8,010	100.0	7,177	100.0	3,956	100.0

*General Schedule work force.

Source: U.S., Department of Justice, Immigration and Naturalization Service, "INS Minorities by Minority Group Designator Within Series" (Personnel Systems, Washington, D.C.: September 1978), cited in U.S., Commission on Civil Rights, staff paper, "The Immigration and Naturalization Service: An Employment Profile" (November 1978), p. 57.

TABLE 3.4

Immigration and Naturalization Service Work Force,* Cumulative Distribution, September 1978

		White/Anglo			Minority**			Women			Total		
Grade	Salary range	f	Cum f	Cum %	f	Cum f	Cum %	f	Cum f	Cum %	f	Cum f	Cum%
15+	$38,160–49,608	148	8,010	100.0	13	3,123	100.0	6	3,956	100.0	161	11,133	100.0
14	32,442–42,171	280	7,862	98.2	16	3,110	99.6	23	3,950	99.8	296	10,972	98.6
13	27,453–35,688	295	7,582	94.7	22	3,094	99.1	23	3,927	99.3	317	10,676	95.9
12	23,087–30,017	497	7,287	91.0	44	3,072	98.4	37	3,904	98.8	541	10,359	93.0
11	19,263–25,041	1,281	6,790	84.8	201	3,028	97.0	141	3,867	97.8	1,482	9,818	88.2
10	17,532–22,788	24	5,509	68.8	5	2,827	90.5	2	3,726	94.2	29	8,336	74.9
9	15,920–20,699	1,770	5,485	68.5	515	2,822	90.4	235	3,724	94.1	2,285	8,307	74.6
8	14,414–18,734	65	3,715	46.4	34	2,370	75.9	43	3,489	88.2	99	6,022	54.1
7	13,014–16,920	536	3,650	45.6	243	2,273	72.8	338	3,446	87.1	779	5,923	53.2
6	11,712–15,222	375	3,114	38.9	270	2,030	65.0	321	3,108	78.6	645	5,144	46.2
5	10,507–13,657	1,701	2,739	34.2	766	1,760	56.4	1,209	2,787	70.4	2,467	4,499	40.4
4	9,391–12,208	532	1,038	13.0	459	994	31.8	750	1,578	39.9	991	2,032	18.3
3	8,356–10,877	435	506	6.3	474	535	17.1	723	828	20.9	909	1,041	9.4
2	7,422– 9,645	71	71	0.9	61	61	2.0	105	105	2.7	132	132	6.2
	Median		8.5			4.5			4.5			6.5	
	Mode		9.0			5.0			5.0			5.0	
	Mean		7.8			6.0			5.2			7.4	

F=Frequency or number of cases occurring at a specific GS level.

*General Schedule work force.

**Includes blacks, Hispanics, Asian Americans, and American Indians.

Source: U.S., Department of Justice, Immigration and Naturalization Service, "INS Minorities by Minority Group Designator Within Series" (Personnel Systems, Washington, D.C.: September 1978), cited in U.S., Commission on Civil Rights, staff paper, "The Immigration and Naturalization Service: An Employment Profile" (November 1978), p. 56.

TABLE 3.5

Immigration and Naturalization Service Work Force* by Grade Level, Race, Ethnicity, and Sex, Percentage Distribution (Vertical), September 1978

Grade	Salary range	Black	Hispanic	Native American**	Asian American	Total minority group	White/Anglo	Total	Male	Female
2	$ 7,422– 9,645	4.0%	0.5%	0.0%	0.0%	2.0%	0.9%	1.2%	0.4%	2.7%
3	8,356–10,877	25.2	8.8	0.0	3.2	15.2	5.4	8.2	2.6	18.2
4	9,391–12,208	20.2	11.3	15.4	7.8	14.7	6.6	8.8	3.4	19.0
5	10,507–13,657	20.8	23.7	15.4	46.5	24.4	21.2	22.2	17.5	30.5
6	11,712–15,222	7.9	8.3	0.0	14.1	8.6	4.7	5.8	4.5	8.1
7	13,014–16,920	7.8	7.4	15.4	9.5	7.9	6.7	7.0	6.1	8.5
8	14,414–18,734	1.0	1.1	0.0	1.4	1.1	0.8	0.8	0.8	1.1
9	15,920–20,699	4.9	27.3	30.8	12.4	16.5	22.1	20.5	28.5	5.9
10	17,532–22,788	0.1	0.1	0.0	0.7	0.2	0.3	0.3	0.4	0.1
11	19,263–25,041	5.5	7.9	7.7	2.5	6.4	16.0	13.2	18.6	3.6
12	23,087–30,017	1.2	1.7	7.7	0.7	1.4	6.2	4.9	7.0	0.9
13	27,453–35,688	0.7	0.7	7.7	0.4	0.7	3.7	2.8	4.1	0.6
14	32,442–42,171	0.5	0.6	–	0.4	0.5	3.5	2.7	3.8	0.6
15	38,160–49,608	0.2	0.6	–	0.4	0.4	1.6	1.3	1.9	0.2
16	44,756–56,692	–	–	–	–	–	0.1	0.1	0.2	–
17	52,429–59,421	–	–	–	–	–	0.1	0.1	0.1	–
18	61,449–	–	–	–	–	–	0.1	0.1	0.1	–
Total		100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

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*General Schedule with force.

**Includes Aleuts and Eskimos.

Source: U.S., Department of Justice, Immigration and Naturalization Service, "INS Minorities by Minority Group Designator Within Series" (Personnel Systems, Washington, D.C.: September 1978), cited in U.S., Commission on Civil Rights, staff paper, "The Immigration and Naturalization Service: An Employment Profile" (November 1978), p. 51.

TABLE 3.6

Immigration and Naturalization Service, Employment in Selected Occupations by Series, Race, Ethnicity, and Sex, September 1978

			Black		Hispanic		Native American		Asian American		White		Total		Minority	Female
Occupation/Series		**Total**	**M**	**F**	**M**	**F**	**M**	**F**	**M**	**F**	**M**	**F**	**Min.**	**Fem.**	**%**	**%**
Personnel mgt./sp.	201	25	0	1	1	0	0	0	0	0	18	5	2	6	8.0%	24.0%
Personnel spec.	212	32	1	4	0	0	0	0	0	0	4	23	5	27	15.6	84.3
General clerical	301	1,589	103	254	235	69	1	0	11	23	569	324	696	670	43.8	42.1
Clerk	305	536	82	162	33	10	0	1	5	8	100	135	301	316	56.1	58.9
Stenographer	312	320	1	47	0	45	0	0	0	2	2	223	95	317	29.6	99.0
Secretary	318	250	1	34	0	23	0	1	0	4	0	187	63	249	25.2	99.6
Clerk typist	322	624	16	201	8	71	0	0	0	6	27	295	302	573	48.3	91.8
Admin. officer	341	15	1	0	1	2	0	0	1	0	6	4	4	6	26.6	40.0
Program analyst	345	32	0	1	1	0	0	0	0	0	26	4	2	5	6.2	15.6
Accountant	525	35	0	3	0	1	0	0	0	2	7	22	6	28	17.1	80.0
Voucher exam.	540	20	0	0	0	1	0	0	0	0	4	15	1	16	5.0	80.0
Attorney	905	251	4	3	6	4	0	0	3	0	211	20	20	27	7.9	10.7
Contact rep.	962	267	7	74	11	48	0	1	3	7	20	96	151	226	56.5	84.6
Interpreter	1047	605	3	8	20	51	0	0	82	53	160	228	217	340	35.8	56.1
Investigator	1811	1,083	38	5	79	1	1	0	3	1	917	38	128	45	11.8	4.1
Inspector	1816	2,259	48	73	207	58	3	1	21	29	1,464	355	440	516	19.4	22.8
Patrol officer	1896	2,151	16	1	390	7	2	0	5	0	1,717	13	421	21	19.5	0.9
Subtotals		10,094	321	871	992	391	7	4	134	135	5,252	1,987	2,854	3,388	28.2	33.5
Totals				1,192		1,383		11		269		7,239				
Percent of total				11.8%		13.7%		0.1%		2.6%		71.7%				

Source: U.S., Department of Justice, Immigration and Naturalization Service, "INS Minorities by Minority Group Designator Within Series" (Personnel Systems, Washington, D.C.: September 1978), cited in U.S., Commission on Civil Rights, staff paper, "The Immigration and Naturalization Service: An Employment Profile" (November 1978), p. 58.

minority and female employees have little or no participation in formulating INS policy or in making agency decisions.[15]

Obtaining Information from INS

INS maintains a number of district offices throughout the United States that are intended, in part, to provide information to the public about the necessary procedures to be followed in seeking benefits such as the right of U.S. citizens to bring close relatives into the United States, under the immigration laws. Many problems in INS information services were recognized by Leonel Castillo, former Commissioner of INS, shortly after his appointment. After taking office, he gave the following assessment of INS service functions at the Los Angeles district office:

> People were lining up at midnight in hopes of being seen the next morning. Many telephone calls were going unanswered, or callers received only a busy signal. Information and forms were difficult, if not impossible, to obtain, without a trip to the office, and oftentimes, an all-day wait in line.[16]

Because of these problems, former Commissioner Castillo introduced reforms such as establishing "satellite" offices to dispense forms and information, bringing automation to its operations through the Houston "model office," creating a training course for contact representatives, and improving INS application forms. These reforms have been acknowledged as "very promising starts" in correcting some of the deficiencies.[17] According to one immigration lawyer, these measures have improved INS service to the public:

> We have had a new Commissioner of the Immigration Service who has been in office for less than a year. In this short time, as Mr. Rosen has pointed out, and as we as practicing lawyers all recognize, there have been commendable improvements. First of all, there has been a very serious attempt to humanize the Immigration Service, correct many of its inequities, reduce the backlog, and there has generally been an improvement in the atmosphere.[18]

Even employee attitudes were said to have improved; one immigration attorney testified that "in terms of discourtesy of the employees of INS, I must admit that they are getting better. . . ."[19] Nevertheless, the U.S. Commission on Civil Rights has received much testimony that numerous problems exist with the INS information services. Former Commissioner Castillo recognized that these services needed to be improved and noted that the INS was considering methods to provide better service to the public. He stated:

> With respect to the information functions, we agree that it is in need of improvement. Plans are presently being discussed to transfer responsibility for this function to Adjudications which will also assume responsibility for training contact representatives and the support personnel assigned to the information function. We feel these changes will improve the program by placing it under control of the division which is primarily responsible for granting immigration benefits to the public.[20]

INS has had difficulty managing its contact points with the public to avoid giving callers the "runaround" when their calls are finally answered. Carl Wack, INS Associate Commissioner for Examinations,[21] freely acknowledged that there are serious problems in dealing with telephone inquiries by the public and attributed this in part to insufficient staffing at INS contact points:

> We have in all our offices a problem with respect to the manning of our contact points with the public, where we are overwhelmed. In some areas we have put in as many as 10, 20 phones, manned phones, and even then the telephone company tells us that they take surveys and find that so many hundred calls a day, according to their equipment, have not been responded to.
>
> However, in each office we do have a contact point and the phone that is listed is—will

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[15] "Employment Profile," p. 46.

[16] Leonel Castillo, Commissioner, INS, statement, in *Undocumented Aliens: Hearings Before a Subcommittee of the House Committee on Appropriations,* 95th Cong., 2d sess. (1978), p. 3. (hereafter cited as Castillo Statement).

[17] Michael Cortes, vice president for research, advocacy, and legislation, National Council of La Raza, testimony, Washington Hearing Transcript, p. 21.

[18] Benjamin Gim, testimony before the New York State Advisory Committee to the U.S. Commission on Civil Rights, open meeting, New York City, Feb. 16–17, 1978, vol. 1, p. 233 (hereafter cited as New York Open Meeting Transcript).

[19] Raymond Campos, testimony before the California Advisory Committee to the U.S. Commission on Civil Rights, open meeting, Los Angeles, June 15–16, 1978, p. 117 (hereafter cited as Los Angeles Open Meeting Transcript).

[20] Leonel Castillo, Commissioner, INS, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Sept. 28, 1979 (hereafter cited as Castillo Letter).

[21] Mr. Wack retired from the Service in May 1980. He was the Associate Commissioner for Examinations from October 1975 until his retirement.

> automatically go to that number. That's part of the problem, by trying to concentrate the calls at one point; so that to eliminate the very problem you describe, we, in effect, overwork that particular instrument or individual.
>
> They are not supposed to refer cases unless it is one of difficulty.[22]

Although Associate Commissioner Wack had instructed his employees to avoid referring callers to several different persons for information,[23] this does not help those persons whose calls are not answered.

Persons who, having tried unsuccessfully to contact INS by telephone, go in person to INS offices to obtain information encounter similar difficulties: there are not enough employees detailed to answer questions. Long lines and long waits to obtain needed information and forms must often be endured at INS offices. One community leader in Los Angeles testified:

> You had to wait about 4 to 5 hours to be served, or 1 to 2 to 3 hours just to get simple information. I think this is a tremendous. . .waste of time. . . .[24]

Similarly, Michael Cortes, vice president of the National Council of La Raza, stated that, "the outrageously long lines and the variety of other obstacles thrown up" tend to discourage people from seeking information and benefits to which they are entitled by law.[25]

The contact representatives who dispense information to the public at INS offices are hired at the GS-5—7 range and are considered clerical workers rather than immigration officers.[26] Prior to 1978, contact representatives were not provided with any formal training in immigration law, although a new training course has since been implemented.[27] Although contact representatives are not immigration officers,[28] they are expected to answer a wide range of questions from the public and to make certain preliminary determinations as to the eligibility of applicants for immigration benefits. Mr. Wack stated that contact representatives must:

> accept applications across the counter and make a finding as to whether it is *prima facie* eligible on its face only, whether they have the proper documents, whether the relationship appears to be proper, whether the jurat is signed and so forth, and then refer it to the adjudicator.[29]

In the future, contact representatives will be given even more responsibility for acting on certain types of applications. Mr. Wack predicted that:

> In some cases we hope they will be able, after we've had more training, to grant such minor things as extensions of stay on the spot, rather than having to get into the chain and take some period of time.[30]

The U.S. Commission on Civil Rights has also received complaints from the public about the rude treatment received at the hands of INS employees. The INS has denied these allegations and has informed the Commission that Service policy does not condone such behavior on the part of agency employees. Former Commissioner Castillo stated:

> the Service is severely criticized for such things as racial antagonism, rude treatment, prejudice and discrimination. We regard these allegations as extremely serious. We do not condone any such conduct in our employees. We not only strive to instill in all our employees the necessity of being fair and courteous, but it is also our policy to take corrective action in any instances in which an employee fails to adhere to these standards.[31]

However, one attorney testified that:

> The Immigration Service, for those who have frequented their facility, is possibly the rudest agency that I have ever encountered in terms of their treatment of the public, particularly the alien public.[32]

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[22] Carl Wack, testimony, Washington Hearing Transcript, pp. 184-85.

[23] "It is a problem that we have instructed all of our people to keep to a minimum. One contact point." Ibid., p. 185.

[24] Pok Than, vice president of the United Cambodian Community, testimony, Los Angeles Open Meeting Transcript, p. 11.

[25] Michael Cortes, testimony, Washington Hearing Transcript, p. 21.

[26] Wack Testimony, Washington Hearing Transcript, p. 178.

[27] Leonel Castillo, Commissioner, INS, testimony, Washington Hearing Transcript, p. 122. Three such training sessions were held in 1978. See also exhibit material submitted by Carl Wack, as reprinted in U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 14-15, 1978, vol. II: Exhibits, pp. 331-32.

[28] Contact representatives are currently part of the Information Services Division at INS; in the near future, however, they will be transferred to the Examination Division and their activities will be supervised by the Associate Commissioner of Examinations. Wack Testimony, Washington Hearing Transcript, p. 178.

[29] Ibid., p. 178.

[30] Ibid., p. 179.

[31] In commenting on this chapter of the report, Commissioner Castillo not only denied the allegations but also stated that they were not specific enough for the Service to make any further response. Castillo Letter.

[32] Austin Fragomen, professor of law, New York University and Brooklyn Schools of Law, New York Open Meeting Transcript, vol. 1, p. 247.

INS employees, he said, are characterized by "their lack of sensitivity and lack of respect in dealing with persons who are foreign-language-speaking individuals."[33] Michael Cortes, vice president of the National Council of La Raza, also testified that INS employee attitudes are a common problem and can at times be characterized as bigotry. He said that the contact representatives "make disparaging remarks and are generally uncooperative toward folks who happen to be of a different color or language than themselves."[34]

Rude behavior and uncooperative attitudes, allegations denied by INS,[35] on the part of INS employees, while unjustified, are possibly symptoms of a deeper problem, that is, the extent to which the differing needs and problems of persons who come from various countries can be understood. Pedro Lamdagen, a Pilipino immigration attorney, testified that Pilipinos encounter insensitive and brusque treatment from INS employees. He observed that:

> there is perhaps an insensitivity to the needs and the possible alternative solutions or answers to the problems of a Pilipino seeking to assist the immigration of relatives or friends, and. . .there are problems very often in being summarily dismissed or really brusquely given an answer to a problem. . . .[36]

George Lee, an immigration lawyer, testified that INS officers in the Los Angeles office are not familiar with the difficulty of obtaining necessary documentary evidence from the People's Republic of China, possibly because of their ignorance of the structure of Chinese village life.[37]

Hiring more employees from minority groups could help to increase INS sensitivity and provide more courteous and knowledgeable service to the public. Such a move could also increase the public perception that INS is aware of and sensitive to community needs. Mr. Lamdagen testified that few Pilipinos are currently employed by INS as contact representatives:

> I am aware of a few Pilipinos that have recently, in my observation at the local office of INS, been employed by the Immigration Service. I know one inspector in Travel Control, and I know of a few clerks with the Immigration Service, but to the extent of having much-needed public contact with inquiries and applicants, I have not seen much of that, no.[38]

Similarly, Mr. Lee testified that very few Chinese are employed in any position by INS in Los Angeles:

> There is an interpreter, and that interpreter is only used at the time when you have a hearing. There is no—there is just one lady clerk, but she is not meeting the public in the room where the Chinese people go in. . . .[39]

The lack of minority representation and the apparent lack of sensitivity and cultural awareness on the part of some INS employees has resulted in some applicants from minority communities being treated contemptuously and presumed to be wrong until they can prove otherwise. The Rev. Bryan Karvelis of the Brooklyn Diocese of the Roman Catholic Church testified that, in his view, this prevailing negative attitude toward aliens held by employees throughout INS is very burdensome for applicants:

> [W]hen you go over to the central office here in Federal Plaza, the way the individuals who come up before judges, who are trying to make applications for various—regularizing their status, the attitude of [INS employees] is always very curt, always tends to put the burden of proof on the person who is coming. "You are wrong. You have to prove that you are right." It's just a kind of a general overall negative attitude. "We will try to keep you out of this country if we possibly can." I am speaking now, obviously, of attitudes. I'm not speaking now of any illegal actions on their parts, but rather attitudes.[40]

This attitude can have a negative effect on many persons by discouraging them from filing applications for benefits to which they may be entitled. Victor Maridueno, a community leader, testified that the public is treated contemptuously by those INS employees who consider aliens "guilty" until proven otherwise:

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[33] Ibid., p. 251.

[34] Cortes Testimony, Washington Hearing Transcript, p. 21.

[35] Castillo Letter.

[36] Pedro Lamdagen, testimony, Los Angeles Open Meeting Transcript, p. 9.

[37] George Lee, testimony, Los Angeles Open Meeting Transcript, pp. 12–14, 17. His testimony on this problem is presented in greater detail in a later section of this chapter entitled, "Exercise of Discretion by INS Adjudicators."

[38] Lamdagen Testimony, Los Angeles Open Meeting Transcript, p. 10.

[39] Lee Testimony, Los Angeles Open Meeting Transcript, p. 16.

[40] Bryan Karvelis, testimony, New York Open Meeting Transcript, vol. 1, pp. 143–44.

> There is no question in my mind that the most rude, imperious, and insensitive officials that I have ever observed are those of Immigration. I do not know if it is because they are overworked or because they believe that they are imbued with divine right that they perform their services in the contemptuous manner in which they maltreat the aliens that they are paid to service. More than one time have I heard officials addressing with ethnic slurs or abruptly brushing off the person who has approached them. These immigration officers are the antithesis of what this country stands for. In this nation, which is the flag bearer of democracy around the world, a person is innocent until proven guilty. For an immigration official, regardless whatsoever of the encounterer's circumstances, a person is guilty until he proves himself innocent.[41]

Access to Applicant's Files

After a person has succeeded in filing the appropriate forms, he or she often encounters problems in obtaining information on the status of the case. Kalman Resnick, an immigration lawyer, testified that there is no effective procedure for obtaining information on the status of a petition after it has been filed with INS:

> [O]ne of the big problems, even after you've waited a year, if you do not hear about what's happening to your application, there are no procedures available for easily finding out what has happened to your application, either for the attorney or for the applicant herself or himself.[42]

A major reason given for the inability to obtain information on the status of a case is lost files.[43] Former INS Commissioner Castillo admitted that many files are indeed lost, not merely misplaced, by INS, and attributed this problem to the Service's manual retrieval system. At certain major district offices, including Los Angeles and New York, as many as 25 employees are detailed daily to search for missing files.[44]

Recognizing these problems, INS has begun the development of a "model office" in Houston that uses a computer to track applications, retrieve files, and perform other functions. At the Houston office, most files can be retrieved "within a minute" through the automated tracking system.[45] INS offices that have not been computerized, however, continue to present obstacles to applicants or petitioners who are trying to discover the status of their cases. Clearly, this results in delays for United States citizens and residents who want to be reunited with their families abroad and for resident aliens who wish to avail themselves of benefits under the immigration laws for which they are eligible.

Lost files can result in more than a delay in the adjudication of a petition or application. Lee Teran, an attorney, described a situation in which her client, a permanent resident alien who had lost his passport and I-151 resident alien identification card, was subjected to an exclusion hearing by INS. Because INS was unable to locate his immigration file, he was excluded and not allowed to enter the United States. Ms. Teran testified that "as far as I know the file was never located," and as a result, her client was unable to enter for a year and a half.[46]

Despite the serious consequences that may result from lost files, testimony received by the Commission indicates that in some INS offices lost files continue to be a problem and that the situation is not improving. As one experienced immigration attorney stated:

> [M]any times after several inquiries and being told that a particular case is being processed, you'll finally be told that the file was lost. It seems that the problem of lost files is a problem that's getting worse, at least in the district office that I deal with here in Washington, D.C.[47]

Processing Backlogs

Once a person has filed a petition or application, INS must determine whether or not to grant the benefits requested. For several years the large number of petitions and applications awaiting INS adjudication has been a subject of public criticism. The problem was recognized by former Commissioner Castillo. In reviewing a draft of this report prior to publication, he commented:

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[41] Victor Maridueno, past president of PROECUA (Association of Ecuadorian Professionals Overseas) and director of social services of Ecuadorian Cultural and Social House, testimony, New York Open Meeting Transcript, vol. 1, p. 233.

[42] Kalman Resnick, testimony, Washington Hearing Transcript, p. 154.

[43] See United States v. Guevara-Martinez, 597 F.2d 954 (5th Cir. 1979) (involving a case where the INS lost a file containing an I-130 petition for 9 months.)

[44] Castillo Testimony, Washington Hearing Transcript, p. 128.

[45] Ibid.

[46] Lee Teran, testimony before the Texas Advisory Committee to the U.S. Commission on Civil Rights, open meeting, San Antonio, Sept. 12-14, 1978, vol. 3, pp. 181-83 (hereafter cited as Texas Open Meeting Transcript).

[47] Ronald Chirlin, testimony, Washington Hearing Transcript, p. 160.

> One of the criticisms in the report is that immigration benefits delayed are, for all practical purposes, immigration benefits denied. To help expedite decisions on applications for such benefits, the INS Adjudications Division implemented new procedures which combined related applications and petitions. By doing this, we significantly reduced adjudication time and also cut by at least 50 percent the number of INS/applicant transactions necessary before the benefit was granted. These new procedures have been met with great favor by the public; applicants for the combined benefits are now receiving those benefits more quickly than ever before. Because of the success which this program has experienced, we are expanding it to further increase our ability to deliver benefits.[48]

Expedited adjudications decisions were necessary, for testimony received by the Commission indicated that in many cases U.S. citizens were required to wait over a year before INS approved their visa petitions to bring in close relatives, that permanent residents had to wait 1-1/2 years after filing their petitions before they could become naturalized citizens,[49] and that "unwarranted delays" of 2 to 3 years existed in processing applications for other immigration benefits.[50]

The result of such processing delays is, in effect, to deny immigration benefits to persons who are entitled to them by law. Former Commissioner Leonel Castillo recognized the extent of this backlog and the serious consequences it has upon those whose families are separated and whose lives are disrupted:

> The [backlog] of pending cases to be adjudicated, even simple ones, [was] so great that it took months or even years to reunite relatives, to obtain adjustment to permanent resident alien status, or, in some cases, to receive a simple extension of a stay for a student.[51]

He offered the following perspective on the backlog problem:

> With respect to the backlogs and their effects, we do not agree that benefits delayed are benefits denied. We do agree that is unfortunate to all concerned when benefits are delayed. However, the backlog problem must be put into perspective in terms of Adjudications workload and resources. Since 1976, receipts of all categories of applications and petitions have increased by 50 percent, from 1.2 to 1.8 million cases.
>
> This tremendous workload increase has not been accompanied by a commensurate increase in Adjudications resources with which to do the additional work. Management improvements which we have made, such as combined processing, are by themselves insufficient to cope with the workload. Unless the resources necessary to eliminate excess adjudication time are provided, the backlog problem and its effects will continue.[52]

Although the Commissioner did not agree with our analysis of the effect of the backlog, it is clear from his comments that the problem is far from solved.

The INS has made several moves to improve the speed and efficiency of the service process: mobile "task forces" composed of adjudications officers from various offices have been sent for a specified time to other INS district offices with huge backlogs to help process those cases;[53] the Service has expanded the community outreach program to train community volunteers in immigration law to enable them to assist people in completing INS forms and applying for immigration benefits;[54] and INS has implemented a "remoting out" program by which applications are farmed out to personnel in other branches of the Service who, because of the nature of their assignments, have free moments during their duty day.[55] While these measures have helped to reduce the number of complex applications awaiting INS action, the processing backlog is still present, according to Ralph Kramer, INS Deputy Assistant Commissioner for Adjudications:[56]

> At the present time in September [1978], we had 234,000 applications and petitions pending. This is down from 241,000 when we began our crash program and our efforts to reduce the backlog in a serious vein. That was in June 1977. However, there's been a distinct difference.
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> While the total numbers appear to be relatively the same. . .[w]hat we are now dealing with

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[48] Castillo Letter.

[49] Resnick Testimony, Washington Hearing Transcript, p. 154.

[50] John Phalen, executive director, International Institute of Los Angeles, testimony, Los Angeles Open Meeting Transcript, p. 159.

[51] Castillo Statement, p. 3.

[52] Castillo Letter. The effects of the backlog upon the public are discussed in detail later.

[53] Ralph Kramer, testimony, Washington Hearing Transcript, p. 174.

[54] Castillo Testimony, Washington Hearing Transcript, pp. 122, 127.

[55] Kramer Testimony, Washington Hearing Transcript, p. 174.

[56] Mr. Kramer retired from the Service in January 1980. He was the Deputy Assistant Commissioner for Adjudications from September 1974 until his retirement.

> are applications and petitions that take less time for us to adjudicate than was the case in June of 1977.[57]

These substantial delays in the current applications process often result in severe hardships to applicants or petitioners and their families. Persons who qualify by law for certain benefits and who must wait for many months or even years to receive consideration of their petitions are in effect being denied those benefits by INS during the lengthy waiting period. Families can be separated by such delays, where a family member must wait outside the United States pending INS approval of the adjustment application, or where spouses of United States citizens must wait outside the United States pending INS approval of their petitions for visa preferences. Persons who are entitled to adjust their status to permanent resident must often wait for INS to process their applications, thus deferring the date on which they may apply for U.S. citizenship and obtain all the rights that accompany citizenship, one of the most important of which is the right to exempt members of their immediate family from immigration quotas.

Hardships other than the separation of families can also befall persons whose applications are not processed immediately. Dale Swartz, an immigration attorney, testified that "substantial delays" in issuing work authorizations to persons whose adjustment of status applications are pending prevent applicants from working during the time needed for INS to approve their applications.[58] INS failure to issue work authorization documentation to those entitled to it often undermines the applicants' financial resources and, in many cases, compels them to violate their nonimmigrant status by working illegally to support themselves. Martin Needleman, an immigration practitioner, testified that such delays in issuing work authorizations can also have damaging effects on applicants who cannot find work and whose applications are thereby denied because of the possibility that they may become public charges:

> What that does is that they put themselves into a position where they have no choice but taking the worst kind of lowest paying jobs or not being able to find employment at all, and what's the result of that in the system? They are then not able to overcome the public charge provision of the statute, and they can never get residency and they never get work authorization. So, it's an ugly circle, and it's substantially forced by delay that's involved in these determinations.[59]

INS has recognized the problems created by delayed work authorizations and has agreed to try to alleviate the burdensome wait for such authorizations. As Dale Swartz testified:

> We've done some work in this area relating to substantial delays in the issuance of work authorizations, and very recently the Immigration Service agreed to promulgate new guidelines designed to ensure that persons who applied for adjustment [of] status will immediately receive a work authorization while their application is pending, as long as they've made out a *prima facie* case that they're eligible for adjustment.[60]

Perhaps the most serious consequence, however, of the backlogs is the disruption and separation of families that result from these delays and despite the Immigration and Nationality Act's avowed purpose of promoting family unity. Significantly, where increased INS efforts are directed at reducing backlogs, the effect, superficially at least, is to create more work for INS. Then INS Commissioner Castillo testified that at a recent naturalization ceremony in Baltimore 700 people became U.S. citizens; 1 hour later they were filing petitions with INS to bring in other members of their families. He concluded, "and so, rather than clearing up workloads, we added workloads."[61] Rather than indicating that INS is on a treadmill, the fact that these new citizens immediately filed petitions to bring in their relatives seems to indicate that the effect of completing the applications for naturalization is to promote the reunification of families. Given the existence of large INS backlogs, it may be assumed that a large percentage of those who were naturalized experienced a long delay in receiving the benefits to which they are entitled by law and that their families were separated for a longer period than necessary by INS processing delays.

Because these delays have such detrimental effects upon all applicants, be they U.S. citizens, permanent residents, or aliens, every effort must be made to recognize and root out the factors that created the Immigration Service backlog. Chief among the reasons generally cited for the backlog are the historical emphasis placed on enforcement functions and the unavailability of sufficient resources for INS service functions.

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[57] Kramer Testimony, Washington Hearing Transcript, pp. 174–75.

[58] Dale Swartz, director, Alien Rights Law Project, Washington Lawyers' Committee for Civil Rights Under Law, testimony, Washington Hearing Transcript, p. 152.

[59] Martin Needleman, testimony, New York Open Meeting Transcript, vol. 1, p. 257.

[60] Swartz Testimony, Washington Hearing Transcript, p. 152.

[61] Castillo Testimony, Washington Hearing Transcript, p. 126.

Former Commissioner Castillo attributed the problem to the lack of resources available to INS for the performance of all of its functions. He said that both the service and enforcement branches were "unbelievably strapped" for resources and that the INS staff should be increased two or three times in size to handle the workload.[62] As an example of this accelerating problem, he noted that in 1977 INS received 100,000 cases each month and was able to adjudicate 100,000 monthly, while in 1978 INS received 177,000 cases monthly and was not allotted additional resources to process the increase.[63] An INS investigator stated that INS resources have not increased in proportion to the growth in the number of aliens in the United States seeking benefits:

> I would like to comment on one thing, also, that with respect to our backlogs and the volume of work that is performed by the Immigration Service, obviously the immigration staff. . .has not kept pace with the alien population, and this is the biggest single reason why oftentimes we cannot accomplish something as quickly as we would like to do it.
>
> We realize that these people are waiting for certain benefits, and we just simply do not have the capability to respond as timely as we would like to.[64]

Limited resources, however, may not be the sole reason for the continued presence of processing backlogs. Benjamin Gim, an immigration attorney, attributed the backlogs in part to the "badly conceived priority program" of the previous administration, which concentrated Service resources on its apprehension and deportation functions to the exclusion of its service responsibilities.[65] It has been suggested that although the claim of insufficient manpower may be justified, the allocation of existing resources indicates "misformulated priorities,"[66] with INS allocating its investigation staff to "often futile and very costly pursuit of the limited number of undocumented immigrants" instead of assigning investigators to handle the backlogged petitions for benefits. "It would seem," said Michael Cortes, "that INS is more interested in hunting down undocumented workers than they are in enabling those who are entitled to remain in this country to secure their rights."[67] Such allocation of resources is possible because, having both enforcement and service functions, INS is able to funnel its resources to those programs it wishes to emphasize:

> [T]he word "Service" would indicate the performance of a service and in many instances what happens in the present structure of the agency, because of its dual function in enforcement and adjudications. . .much of the allocation goes towards enforcement and subsequently the adjudicative process of the Service fails to function appropriately. What this will do is create a workload in various offices of the Immigration Service. . . .Backlogs and delays which in effect will cause a violation, in our opinion, of the civil rights of not only the aliens themselves but of Americans. . . .[68]

Exercise of Discretion by INS Adjudicators

In many instances, statutorily created immigration benefits are available to eligible applicants only when the Attorney General or his designee[69] determines in his discretion that relief should be granted. To obtain these benefits, an applicant must prove that he or she meets the statutory requirements for relief and then persuade the adjudicator to exercise discretion in favor of granting the relief sought.[70]

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[62] Ibid., p. 125.

[63] Ibid., p. 127.

[64] Phillip Smith, testimony, Los Angeles Open Meeting Transcript, p. 129.

[65] Gim Testimony, New York Open Meeting Transcript, vol. 1, pp. 233–34.

[66] Cortes Testimony, Washington Hearing Transcript, p. 21.

[67] Ibid.

[68] Steven Mukamal, testimony, Washington Hearing Transcript, p. 235–36.

[69] The Attorney General has enforcement and administrative responsibility for the immigration laws and can delegate this authority to the Commissioner of INS. Immigration and Nationality Act of 1952, §103(a) and (b), 8 U.S.C. §1103(a) and (b) (1976). The Commissioner, in turn, has redelegated his authority to various Service officials. 8 C.F.R. §100.2 (1980).

[70] For example, the statute governing adjustment of status applications provides in pertinent part:

> § 1255. Adjustment of status of nonimmigrant to that of person admitted for permanent residence; record; alien crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without visa.
>
> (a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

Immigration and Nationality Act of 1952, §245, 8 U.S.C. §1255 (1976).

INS adjudicators have extensive discretionary authority to grant or deny applications submitted to them, and in so doing they necessarily bring their own attitudes, opinions, and prejudices to bear upon the cases before them. Maurice Roberts, former Chairman of the Board of Immigration Appeals, noted that:

> Adjudicators with hard-nosed outlooks are likely to be more conservative in their evidentiary appraisals and in their dispensation of discretionary bounties than their counterparts with more permissive philosophies. It must be recognized as a fact of life that Service officers and Board members are no more immune than other persons to the influences that result in individual bias and predilection.[71]

Given the fact that adjudicators exercise their personal discretion in many cases, and that they are not required to be lawyers or otherwise legally trained,[72] the possibility always exists that they may make arbitrary or inconsistent decisions. One immigration attorney noted:

> [Many adjudicators] come from the Border [Patrol], and these people are not trained, are not given the guidelines to make decisions according to any set standards, and as a result, we have the deplorable roulette wheel of justice in which some aliens who may be undeserving may obtain permanent residence, and cases involving very deserving aliens may be turned down.[73]

INS has itself recognized the many problems that unpredictable decisions can create, including the denial of benefits to deserving persons and the granting of benefits to undeserving applicants, as well as the expense of defending erroneous judgments in such cases:

> Poorly written, inconsistent, or legally unsound denials result in unnecessary appeals, generate complaints, deprive aliens of benefits to which they are entitled and are indefensible in the event of judicial review by the courts. Cases approved through error, lack of knowledge, or for any other reason, grant benefits for which the alien is ineligible or undeserved and may necessitate lengthy, time consuming, rescission proceedings.[74]

After recognizing that faulty decisions caused by a lack of adequate firstline supervision[75] and the absence of uniform guidelines can occur, the INS Southern Regional Office recently instituted a quality control program for adjudications.[76] The program encourages firstline supervisors to review all decisions for consistency and accuracy and to assist adjudicators in writing decisions in difficult or unusual cases for possible publication as precedent cases. Comments and reference citations are provided for the "most common problem areas" encountered by adjudicators, and an analysis of various INS forms is furnished with citations to the applicable sections of the law, the Code of Federal Regulations, the Service's Operations Instructions, the Immigrant Inspectors Handbook, and relevant precedent decisions.[77] The INS Central Office has recently informed the Commission that it has adopted a similar program, among other reforms, to reduce arbitrary adjudications decisions.[78]

But where there are no clear Service guidelines or vigilant firstline supervision, inconsistent and erroneous decisions can be made by adjudicators while exercising their discretion. Testimony received by the Commission indicates some possible problems that may arise where adjudicators are given unchecked authority to grant or deny relief in individual cases. Benjamin Gim, an immigration attorney, testified that INS examiners are able to manifest otherwise covert racial antagonisms because of the wide latitude of their discretionary authority:

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[71] Maurice Roberts, "The Exercise of Administrative Discretion Under the Immigration Laws," *San Diego Law Review* (1975), vol. 13, pp. 144, 148.

[72] Andrew Carmichael, INS Assistant Commissioner for Naturalization, testimony, Washington Hearing Transcript, p. 178.

[73] Gim Testimony, New York Open Meeting Transcript, vol. 1, p. 242.

[74] William Zimmer, Associate Regional Commissioner for Examinations, memorandum to All District Directors and Officers in Charge, Southern Region, Nov. 8, 1977, concerning "Quality Control of Adjudications," p. 1 (hereafter cited as Zimmer Adjudications Memorandum). Preston Ivey, Assistant Regional Commissioner for Examinations, Southern Region, testified that the other INS regional offices were furnished copies of this memorandum for their use. Preston Ivey, testimony, Texas Open Meeting Transcript, vol. 4, pp. 364–65.

[75] The regional office said:

> In reviewing these [completed] cases, one of the most apparent causes of deficiencies is lack of consistent and adequate firstline supervision and supervisory review. It is imperative that supervisors not only be trained, but that they limit the performance of journeyman duties and assume to a greater degree the responsibilities of supervision.

Zimmer Adjudications Memorandum, p. 1.

[76] Ibid.

[77] Ibid., see attachments I and II.

[78] The INS informed the Commission:

> This year, INS will render decisions on approximately 1.7 million cases, to be adjudicated by more than 1,000 officers at some 235 different locations throughout the world. Within existing resource levels, we have taken all reasonable actions to prevent inconsistent decisions. However, with such an extensive operation it is impossible to ensure that all decisions will be consistent. The Service publishes and distributes precedent decisions covering all areas of Adjudications. We also have an Adjudications Quality Control Program designed to monitor, among other things, the quality of case decisions in view of the law, regulations, instructions and humanitarian considerations. We have also expanded attendance at our Journeyman Examiners Training Course, in which adjudicators receive advanced instruction in topics which include precedent decisions, proper use of discretion and decision writing. In 1979, more than 30 percent of the adjudicator workforce completed this two week course.
>
> We have also instituted a career ladder program for adjudicators which begins at the GS-5 level. This program not only opens an upward mobility path for the INS clerical workforce, but also gives us the ability to effectively train professional adjudicators.

Castillo Letter.

> And the fact that Section 245 of the Immigration and Nationality Act gives the Immigration Service examiners discretion to grant or deny an application, even though the alien is otherwise qualified, gives them an opportunity to cloak the decisions which are really motivated by racial bias.[79]

Similarly, Pedro Lamdagen, another immigration attorney, attributed some unreasonable exercises of discretion to racial prejudices of some adjudicators:

> I know the Immigration Service doesn't have the personnel, much less the time, to go into all the circumstances in detail, and they really have to rely on their own previous experience, but sometimes, in most cases, that is just a prejudice toward a particular group of people and type of petition. . . .[80]

Decisions which are based upon the racial prejudices of the deciding officer can result in the inequitable treatment of applicants from certain countries or of certain racial groups. One immigration practitioner testified that INS operates upon the presumption that marriages involving persons from certain countries are likely to be shams or involve fraud:

> There are presumptions, for instance, that certain ethnic groups marry other ethnic groups. If a Puerto Rican marries a Greek, you can be certain the Immigration Service will investigate that just because they have a predilection concerning Puerto Ricans marrying Greeks, and that is the typical kind of policy on a functional level which prevails in the Immigration Service.[81]

Similarly, testimony indicated that INS considers certain types of documents, such as letters or testimonials of labor experience, likely to be fraudulent when filed by persons from Asian countries seeking adjustment of status. An immigration attorney testified that, as a result of this presumption, INS automatically sends such cases filed by Asians back to Asia for investigation, whereas a similar letter submitted by a European applicant would not be automatically investigated in this way.[82]

According to testimony received by the Commission, unequal treatment by INS based on applicants' race or national origin is particularly evident in cases involving persons from the People's Republic of China. Steven Mukamal, an immigration attorney, noted that delays in INS processing of cases involving U.S. citizens who wish to bring close relatives from China can stretch to 5 or 6 years after the date of filing. Mr. Mukamal noted, "[R]egardless of how difficult or how wide in scope the application may be, it is certainly an inordinate period of time."[83]

George Lee, a Chinese American immigration attorney, discussed the particular evidentiary problems encountered by persons seeking to help relatives emigrate from Hong Kong or China. Since China issues no marriage certificates and does not keep any registry of similar records, applicants must rely on such secondary evidence as affidavits to establish that certain marriages and births did, in fact, occur in China:

> Now, it is very recently [that] the INS requires that the petitioner make an effort or at least write back to the interior China, [the People's Republic of] China, to seek the documentation. In some instances it has come through, but very sparsely, as far as my own experience is concerned. In many cases I do not get any response at all. However, I am able to get witnesses that are here that are citizens of the United States, or who already received permanent residence, to give affidavits indicating that they lived. . .next door or that they were in the next village or they were in the same school, and that they know Mr. and Mrs. So-and-So to be married, and that the child on such a date was born to this family. Now this is unique among the Chinese cases because they require strong documentary evidence. Now, it would seem that even in a criminal prosecution, where the burden of proof has to be very strong, a witness, two witnesses, can send a man to jail or take his life away, and yet you can have two witnesses, making a sworn statement, or who are ready, willing, and able to appear for the Service to

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[79] Gim Testimony, Washington Hearing Transcript, p. 16.

[80] Lamdagen Testimony, Los Angeles Open Meeting Transcript, pp. 25–26.

[81] Fragomen Testimony, New York Open Meeting Transcript, vol. 1, pp. 250–51.

[82] Ibid., pp. 249–50.

[83] Mukamal Testimony, Washington Hearing Transcript, p. 236.

> give such a statement that so-and-so and so-and-so in fact were married, and he may even have attended the marriage ceremony, and he attended the 1-month party of the issuing of such a marriage, they will still require documentary evidence. . . .[84]

He concluded that this INS requirement that Chinese persons obtain documentary evidence works a distinct hardship.[85] Mr. Lee also testified that Chinese petitioners seeking to help their children immigrate must take a blood test, and "I do not know of any other ethnic group that is required to take a blood test."[86]

The Commission also received considerable testimony concerning the apparent absence of Service guidelines, or, in cases where they do exist, concerning adjudicators' unwillingness to apply them to the cases before them. Raymond Campos, an immigration attorney, testified that INS does promulgate some guidelines for discretionary decisions in their regulations, Operations Instructions, and in the case decisions rendered by the Board of Immigration Appeals, "but the guidelines are not even followed because the case itself is not even looked at."[87] Sam Williamson, another immigration practitioner, similarly testified that INS adjudicators ignore established Service guidelines in "hundreds" of cases in San Antonio by denying adjustment to applicants on the basis of their preconceived intent to remain in the United States, and he noted that these denials are made in spite of the presence of substantial equities on the part of the applicants and despite the existence of Service guidelines[88] requiring that such applicants be granted relief.

Testimony received by the Commission indicates that inconsistent decisions can also occur where no guidelines exist to help adjudicators in interpreting and applying difficult provisions of the law. Steven Merkatz, an immigration specialist, testified that certain sections of the Immigration and Nationality Act are subject to differing interpretations by INS examiners and noted that the "public charge" provision is a striking example of this.[89] Under that section of the statute, adjudicators may deny an application for adjustment of status where, in their discretion, they believe that the applicant is or is likely to become a public charge upon the U.S. Government.[90] Mr. Merkatz testified that the Los Angeles and New York district offices of INS apply different standards to determine whether applicants are likely to become public charges, thereby resulting in inconsistent decisions within the Service:

> In New York, if you are not receiving public assistance at the time you are interviewed, when I worked there, which was from '74 to '75, you had no problem. Here, in Los Angeles, it is pretty much the letter of the law. They will go into how much money you are earning, whether you received assistance prior, and if the amount of money you are earning will allow you to support your family, or whether you are just borderline, and I find this a problem because people do come from other areas to Los Angeles, and tell us, "Well, I had no problem in New York or Philadelphia," and then our clients here say, "Well, it is another story."[91]

Clearly, adequate supervisory review of all adjudications decisions would ensure some degree of consistency and fairness in Service determinations.

Separation of Service and Enforcement Functions

The root of the problems encountered by United States citizens and residents in the service side of INS stem in large part from the conflicting missions of INS—service and enforcement. Several studies that have examined the duties and operation of INS and its predecessors have concluded that combining service and enforcement responsibilities in one agency is undesirable. As early as 1931, the Wickersham Commission found that the agency charged with administering and enforcing the immigration laws had conflicting duties where it was responsible for

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[84] Lee Testimony, Los Angeles Open Meeting Transcript, pp. 13–14.

[85] Ibid., p. 18.

[86] Ibid., p. 14.

[87] Campos Testimony, Los Angeles Open Meeting Transcript, p. 143.

[88] Sam Williamson, testimony, Texas Open Meeting Transcript, vol. 3, pp. 162–63. Mr. Williamson testified that INS guidelines applicable to adjustment of status applications provide that, if such applications were filed shortly after the applicants entered the United States as nonimmigrants, they may be denied on the ground that the applicants had a "preconceived intent" to remain in the United States. These aliens would be considered "immigrants" under the immigration laws and would thus be inadmissible because they presented nonimmigrant rather than immigrant visas. Immigration and Nationality Act of 1952, §§101(a)(15)(b), 212(a)(20), 8 U.S.C. §§1101(a)(15)(b), 1182(a)(20) (1976). Mr. Williamson also testified that, in cases where an applicant has sufficient "equities" that he would otherwise be granted voluntary departure rather than deportation, the INS Operations Instructions provide that his application for adjustment "shall not be denied."

[89] Steven Merkatz, immigration specialist, Jewish Family Services, testimony, Los Angeles Open Meeting, pp. 132–33.

[90] Immigration and Nationality Act of 1952, §212(a)(15), 8 U.S.C. §1182(a)(15) (1976).

[91] Merkatz Testimony, Los Angeles Open Meeting Transcript, p. 132.

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adjudicating applications for immigration benefits as well as deporting persons.[92] That Commission further found that "the confusion of functions limits the effective performance of each function involved" and concluded that a separation of functions was necessary.[93]

A 1978 study commissioned by the INS to evaluate its bail-bond practices noted that INS' dual responsibilities for enforcement and service create "role conflicts which are rife."[94] The study further noted that:

> The internal structure and promotional plans of the Service foster the divergent philosophies of law enforcement and service. Border Patrol Agents become Investigators, become Supervisors, become top Administrators including District Directors. Naturalization Examiners become Trial Attorneys, become Special Inquiry Officers or "Judges." While such a system certainly produces some checks and balances it pits one school against another.[95]

In 1978 the President's Reorganization Project (PRP) of the Office of Management and Budget expressed its concern over the conflicting missions of INS. In its analysis of immigration service and border management functions, the PRP stated:

> In addition to its border enforcement role, INS also administers the immigration laws. Thus, at the same time it is expected to judge issues of human rights objectively, it is also expected to deter entry by undocumented aliens. These two roles are often incompatible and have resulted in the past in emphasis on the enforcement function to the detriment of the other administrative law functions.[96]

As a result, the PRP recommended that immigration service and border enforcement responsibilities should not be given to any one agency.[97]

From the testimony received by this Commission, it is evident that INS officers do, in fact, have an extremely difficult task in striking a proper balance between their duties and responsibilities under each of these functions. Testimony indicates that an overemphasis on enforcement normally occurs.

This disproportionate emphasis on enforcement has resulted in the denial of services or benefits for which persons are eligible under the immigration laws. This problem is particularly evident at INS information counters. As one Texas immigration attorney testified, when a person seeking information in Houston is suspected by INS contact representatives of being illegally in the country, he or she is automatically turned over to enforcement personnel for processing and interviewing.[98] Another experienced immigration lawyer testified to similar experiences with the INS office in Chicago:

> Another large problem in this area—if a person seeks services from the Immigration and Naturalization Service Office, then they are immediately subject to investigation and enforcement actions, if it should come to light during the time they are seeking services that they may be a deportable alien or may be subject to investigation as to whether or not they are deportable aliens.
>
> This is a large problem because some people in the INS in the Central Office have gone on the public record to tell the documentable people to come forward for assistance from the Immigration Service. In Chicago, many of these people are being subject to expulsion proceedings, even though they qualify to lawfully immigrate to the country under the quotas.[99]

INS appears to have recognized some of these problems and has made an attempt towards bifurcating its service and enforcement functions by establishing satellite offices in Los Angeles and New York to provide information and services to the public. In Los Angeles no enforcement personnel are stationed at the El Monte and Santa Ana offices:[100]

> They are extensions of the District Office and they will handle adjudications and processing, respond to inquiries, and distribute forms which will be available from self-service wall racks, again a new innovation. They are staffed with

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[92] Wickersham Commission, *Report on the Enforcement of the Deportation Laws of the United States*, pp. 94–95.

[93] Ibid., pp. 154, 157–59.

[94] INS, "A Comparison of the Bond-Setting Practices of the Immigration and Naturalization Service with that of the Criminal Courts" (1978) (Bruce D. Beaudin, consultant), p. 18.

[95] Ibid.

[96] James T. McIntyre, Jr., Office of Management and Budget, memorandum [on law enforcement, border management, and immigration policy reorganization] to President Carter, June 1, 1978, p. 23.

[97] Ibid., p. 25. Action on the PRP recommendations has been postponed, pending the submission of the report of the newly appointed Select Commission on Immigration.

[98] Williamson Testimony, Texas Open Meeting Transcript, vol. 3, pp. 170–71.

[99] Resnick Testimony, Washington Hearing Transcript, p. 154.

[100] Castillo Testimony, Washington Hearing Transcript, p. 122.

> experienced officers fluent in both Spanish and English.[101]

Because this bifurcation is limited to the New York and Los Angeles satellite offices, however, many INS officers still tend to combine, rather than separate, the service and enforcement functions. Oswald Kramer, INS Regional Commissioner for the Eastern Region, believed that this did not amount to a conflict of duties. He testified that, in his view, the service and enforcement functions are not necessarily separate—performance of one function being necessary to successful performance of the other:

> We tried to train our people to be sensitive to all people, to their problems. One of you mentioned that enforcement and adjudication are two separate, different things, and they have got them both in the Immigration Service. Well, we do have enforcement functions, and we do have services functions; but, why, really, regard those as different things? I think they are both different sides of the same coin. To do a good enforcement job, you have to have in mind the service function that we have, and to do the service function, you have to have the enforcement function. Our investigators primarily go out to apprehend aliens illegally here; but, if he is required to check to make sure, does this person have eligibility for relief under the immigration laws, and to expose that to the individual and offer it to him, and if he gets the relief, that's good enforcement too.[102]

Immigration attorneys often disagree with this analysis. While it may be true in theory that the two functions are related, in practice, there is a conflict between the INS service and enforcement functions. As one attorney testified, the practice of referring persons seeking information to enforcement officers has a chilling effect on prospective applicants who may be entitled to certain benefits but do not dare to file applications at INS offices because they are afraid of being deported:

> The result is that many people are afraid to go to the Immigration and Naturalization Service, will not go for assistance, will not go to file applications, or to find out what's happened to applications because they are then subject to expulsion proceedings. There is no bifurcation of these functions in the Immigration and Naturalization Service in Chicago. You may wait in one line that may appear to be a service line, but you may be immediately transferred to another line or to another officer who is engaged in enforcement functions.[103]

The commingling of service and enforcement responsibilities is not the only problem, however; the situation is exacerbated in the eyes of some people by employees who neglect their service functions in their zeal to enforce the law. Angie Cruz, a community representative, testified:

> The Immigration and Naturalization Service to Asians has never been anything but a policing agency. It seems to be concerned only with its law enforcement function and to the complete disregard of any service delivery. As Asians, with very distinctive looks, we are easy targets of the police tendencies of INS. Our race appears to be the very cause of blatant INS discrimination and complete disregard of civil and human rights. I tend to believe that as far as INS is concerned, all Asians are considered illegal, unless they can show a green card, a system of justice so inconsistent with America's democratic principles.[104]

Some witnesses also stated that, in addition to the combining of the INS service and enforcement functions and its resulting emphasis on enforcement activities, the INS career ladder is a major reason for the negative attitude towards and treatment of the public. Because the Service's career ladder is structured to promote officers who have enforcement experience, most Service employees obtain some job experience in enforcement activities. This enforcement experience tends to result in an "enforcement mentality," which remains with employees even when they are subsequently detailed to "service" jobs or are promoted to policymaking positions. One attorney testified:

> In my opinion, the root of the problem or one of the real causes of the problem is the confusion between the law enforcement and service function of the Immigration and Naturalization Service. The majority of employees of the Immigration Service are involved in law enforcement, investigation, border control, detention and deportation, immigration judges, trial

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[101] Castillo Statement, p. 6.

[102] Oswald Kramer, testimony, New York Open Meeting Transcript, vol. 2, pp. 167–68.

[103] Resnick Testimony, Washington Hearing Transcript, p. 164.

[104] Angie Cruz, vice-chairperson, Philippine Americans for Community Action and Development, and member, Mid-Atlantic Regional Board of PAC-MAR (Pacific/Asian Coalition), testimony, New York Open Meeting Transcript, vol. 1, pp. 14–15.

> attorneys. Thus, the majority of higher grade level positions within the agency are in the law enforcement area, and there are very few high grade level positions on a district office level which are in the applications area. Consequently, as an employee ascending the career ladder, he serves in law enforcement capacities along the way. So, indirectly, the system forces persons who actually aren't that interested in the law enforcement aspect of the Immigration Service to become involved in [some positions] in the law enforcement area, because that's where the high grade levels exist. . . .Law enforcement mentality results in looking for fraud everywhere, which causes the undue harassment of individuals as well as unnecessary delays.[105]

He suggested that the solution to these problems lies in separating the service and enforcement functions of INS:

> [O]ne obvious solution to the problems, at least in part, would be to bifurcate the dual functions of the Immigration Service. Certainly, there should be a greater emphasis on the applications area, and even with the limited manpower, law enforcement personnel should be reassigned applications. Obviously, if there are millions of illegal aliens in the United States, how many can possibly be apprehended—not enough to make any statistical difference. Well, taking a thousand employees who are chasing [undocumented] aliens and assigning them to applications can make an enormous difference in the lives of those persons who have applied and whose lives are literally being destroyed by these unconscionable delays. . . .[106]

Findings and Recommendations

Finding 3.1:

a. Although minorities and women make up a significant portion of the INS work force, they have little or no participation in policy formulation and decisionmaking within INS.

As of September 1978 the INS work force in the General Schedule (GS) pay system[107] included slightly over 28 percent minority employees and approximately 35.5 percent female employees. Most of those employees were concentrated in the lower grade levels, with 74 percent of minority employees and 88 percent of female employees at or below the GS-8 level. Only 3 percent of minority employees and 2 percent of female employees were employed at or above the GS-12 level. In contrast, white employees dominated the upper management and supervisory levels and held 92.7 percent of all jobs at or above the GS-12 level.

b. Few INS employees staffing the Service's contact points with the public have racial or ethnic backgrounds similar to those of many immigrants. This has contributed in part to a strong public perception that persons, particularly those of minority background, are often treated rudely or insensitively by INS employees.

Recommendation 3.1:

a. The INS should continue its commendable efforts to hire minority and female applicants for Service jobs. At the same time, the agency should exert greater effort to place minorities and women in policy and decisionmaking positions of the agency.

b. The INS should also make a concerted effort to employ more bilingual persons, particularly members of major ethnic immigrant groups such as Hispanics and Asians, at its information counters in order to provide better service to members of those communities.

Finding 3.2: INS contact points with the public are understaffed and are not equipped to provide adequate service and information to many persons.

Recommendation 3.2:

a. INS should devote more resources to staffing its contact points with the public to provide adequate service and information to all persons.

b. INS should provide all employees whose jobs involve contact with the public with training in human relations as well as training in the complexities of immigration law and INS procedures. This training should be provided not only for new employees prior to their placement on the job but also for present employees as part of a continuing inservice training program.

Finding 3.3: No effective procedure currently exists through which applicants can obtain information on the status of their cases.

INS loses many applicants' files mainly because of its ineffective manual retrieval filing system. While INS, in recognition of this problem, has begun development of a computerized system for tracking and retrieving files, most INS offices are not computerized.

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[105] Fragomen Testimony, New York Open Meeting Transcript, vol. 1, pp. 247-49.

[106] Ibid., p. 251.

[107] Nearly 96 percent, or slightly over 11,100, INS employees were employed in the GS pay system which, in 1978, ranged in grade from GS-1 through GS-18. Under the reorganization of the civil service, those positions above GS-15 have now been assigned to a senior executive service.

Recommendation 3.3:

a. INS should develop and implement specific procedures by which applicants can obtain accurate information concerning the status of their applications.

b. INS should modernize and make more efficient its system for filing applicants' records. INS should computerize all of its offices to enable its employees to locate files and records quickly.

Finding 3.4: Large backlogs exist in the number of applications for immigration benefits awaiting adjudication by INS.

Long waiting periods, which can stretch from several months to several years, often interfere with the reunification of families, including those of United States citizens. Although the Service has tried to reduce the backlog, a large number of applications still await adjudication.

Recommendation 3.4: Congress should appropriate additional resources to increase INS adjudications staff positions.

Finding 3.5: The absence of clear Service guidelines and vigilant firstline supervision results in inconsistent or erroneous decisions under the extensive discretionary authority of INS adjudicators to grant or deny applications. Moreover, in such areas as the public charge provision where some guidelines exist, INS adjudications are often perceived by the public as inconsistent. To reduce arbitrary exercises of discretion by INS adjudicators, the INS has recently adopted a Service-wide program for quality control of adjudications.

Recommendation 3.5: To ensure effective quality control of adjudications under its new program, the INS should:

a. Publish precedent decisions and unusual or difficult cases as they arise and make them available to all adjudicators.

b. Hold supervisory adjudications officers responsible for reviewing and ensuring the accuracy and consistency of all decisions.

c. Provide supervisors, upon appointment, with further training in immigration law and supervisory techniques to enable them to review all decisions adequately.

d. Implement guidelines clarifying Service policy on difficult sections of the law, such as the public charge provision, specifying the proper interpretation of the law and the evidence to be considered in making such determinations.

Finding 3.6: The combining of both adjudicative/service and enforcement responsibilities in INS results in a subordination of the service function to the enforcement function.

Although INS has established satellite offices in Los Angeles and New York to provide information and services to the public in an attempt to separate its adjudicative/service functions from its enforcement responsibilities, problems continue to exist at other INS offices.

Recommendation 3.6:

a. Congress should create a Border Management Agency within the Department of Treasury and then transfer the INS enforcement function to that agency. Such legislation would enable INS to concentrate all its resources on its service activities and thereby provide the public with improved service.

b. INS should also totally separate its service functions from its remaining enforcement activities, preferably by establishing more satellite offices.

Chapter 4

The Department of State

The Consular Visa Process

Under existing law any person seeking to enter the United States lawfully is required to obtain official permission to apply for entry, termed a "visa," from an American consulate abroad.[1] In most cases where a consular official declines to issue a visa, the prospective immigrant is not the only aggrieved party. The denial can also adversely affect American citizens or legal residents and American businesses who are seeking to bring family members or skilled employees into the country. To these people, the denial of a visa prevents the reunification of a family or causes the loss of needed professional or technical skills, yet a person seeking to overturn an unfavorable ruling will encounter a relatively informal and very limited review process in the State Department.

Whether the applicant seeks to be admitted permanently or on a temporary basis, that is, on immigrant or nonimmigrant status, a variety of supporting evidence, including documents, must be submitted to the consular officer. The applicant has the complete burden of establishing his or her eligibility for a visa through the presentation of this documentary or other supporting evidence. As provided in the statute:

> Whenever any person makes application for a visa. . .the burden of proof shall be upon such person to establish that he is eligible to receive such visa. . .and, if an alien, that he is entitled to the non-immigrant, quota immigrant, or nonquota immigrant status claimed, as the case may be. If such person fails to establish *to the satisfaction of the consular officer* that he is eligible to receive a visa. . .no visa. . .shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not subject to exclusion under any provision of this chapter [emphasis added].[2]

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[1] Under current immigration law, a prospective entrant seeking admission to this country must pass through a double-check system of entry. Initially, either an immigrant or nonimmigrant visa must be applied for and obtained from an American consulate abroad. Visa applicants, in order to obtain visas must prove to the satisfaction of the consular officer that they are eligible to receive visas and entitled (therefore, admissible to the United States) to visas under the immigrant or nonimmigrant status claimed. Once a visa has been secured, the person is entitled to present himself or herself at a United States port of entry where a determination of admissibility is made by the Immigration and Naturalization Service. 8 U.S.C. §§1201, 1225 (1976).

[2] Immigration and Nationality Act of 1952, §291, 8 U.S.C. §1361 (1976). State Department regulations underscore the discretionary authority of consular officers to deny visas unless the visa applicant has met the burden of proof of eligibility for a visa to the satisfaction of the consular officer. For nonimmigrant visas, 22 C.F.R. §41.10 (1979) provides, in pertinent part, that:

> An applicant for a nonimmigrant visa shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer that he is entitled to a nonimmigrant status. . . .The burden of proof is upon the applicant to establish that he is entitled to the nonimmigrant classification and type of nonimmigrant visa for which he is an applicant.

Visa applicants seeking preference immigrant status based upon their relationship to an American citizen or legal resident are required initially to obtain an approved visa petition from the Immigration and Naturalization Service. The receipt of these petitions by the American consulate abroad, however, does not automatically entitle the visa applicants to a first, second, fourth, or fifth preference immigrant status. In addition to the approved visa petition, 22 C.F.R §§42.30, 42.31, 42.33, 42.34 (1979) require that:

> The consular officer is satisfied that the alien has the relationship to the U.S. [citizen or resident alien] indicated in the petition.

Those seeking to enter the United States based upon job or labor skills must also acquire an approved petition from INS. Again, these petitions do not automatically entitle the visa applicant to a third or sixth preference visa. Under 22 C.F.R. §42.32 (1979), a third preference visa still requires that the visa applicant "establishes to the satisfaction of the consular officer that he is within the class described." Sixth preference places a similar burden of proof on the visa applicant in 22 C.F.R. §42.40 (1979), a regulation of

A visa applicant is barred from legally entering the United States without a visa. The statute and State Department regulations make it all too clear that obtaining a visa from a United States consulate abroad depends primarily upon whether the applicant "satisfies" the consular officer that the visa should be granted. "Satisfaction of the consular officer," the statutory standard, vests a high degree of discretion in the consular officer, and, as will be seen, there is little possibility for relief from an abuse of discretion.

Although a consular officer has authority to grant or refuse a visa depending on whether he or she is "satisfied" or not as to the eligibility of a visa applicant, that authority is not completely unbridled since a visa may technically be denied only where the consular officer has "reason to believe" that the applicant is ineligible for a visa. "Reason to believe" requires that "a determination [be] based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible" for a visa.[3] Therefore, "satisfaction of the consular officer" is not a standard granting absolute authority but rather a reasonable person standard requiring the consular officer to exercise a high degree of discretion in deciding whether to issue or deny a visa.

To assist in making determinations, the State Department publishes a visa manual with guidelines for the exercise of discretion in certain specific areas or regarding some types of applications,[4] but these are guidelines only. The decision in each individual case is ultimately left to the discretion of the consular officer. This authority of consular officers and the system of review have been the subject of frequent public complaints. Testimony received from attorneys and other immigration practitioners regarding the exercise of discretionary authority alleges that, in many cases, there was an arbitrary exercise of that discretion.

An immigration attorney testified that consular officers have denied benefits to applicants even though the applications were based on certificates of citizenship issued by the Immigration and Naturalization Service.[5] These certificates are usually issued only after an extensive investigation by the citizenship section of the Service, which is staffed solely with attorneys responsible for determining citizenship claims. Thus, that attorney questioned the second-guessing of INS decisions by consular officers.

The legality of such redeterminations was considered by the United States Attorney General, who issued a written opinion finding that INS certificates of citizenship were binding on the State Department, as only the Attorney General has authority to institute cancellation proceedings to void a citizenship certificate.[6] Determinations and rulings by the Attorney General on questions of law with respect to immigration and naturalization are controlling and must be adhered to by the State Department.[7] But attorney Laurier McDonald testified that, despite the consular officers' relative lack of experience in determining citizenship claims and the binding effect of the Attorney General's opinion, consular officers have denied benefits to applicants on the ground that the petitioners may not be American citizens notwithstanding their INS certificates of citizenship.[8]

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general applicability to all approved INS visa petitions, which provides that:

> Consular officers are authorized by the Secretary of State to grant, upon receipt of, and within the validity period of, a petition filed with and approved by the Immigration and Naturalization Service, the immediate relative or preference status indicated in the petition. The approval of a petition by the Immigration and Naturalization Service shall not relieve the alien of the burden of establishing to the satisfaction of the consular officer that he is eligible in all respects to receive a visa.

[3] 22 C.F.R. §§41.90, 42.90 (1979).

[4] U.S., Department of State, Foreign Affairs Manual, vol. 9, pts. 2-3.

[5] Laurier McDonald, testimony before the Texas Advisory Committee to the U.S. Commission on Civil Rights, Open Meeting, San Antonio, Sept. 12-14, 1978, vol. 3, pp. 92-94 (hereafter cited as Texas Open Meeting Transcript).

[6] 41 Op. Att'y Gen. 452 (1960). In finding that the applicant's possession of a citizenship certificate issued by the INS precluded the State Department from challenging, for passport purposes, the applicant's citizenship, the Attorney General stated that:

> In my opinion, Congress, in providing for the issuance of certificates of citizenship by the Attorney General and theretofore by the Commissioner and Deputy Commissioners of Immigration and Naturalization, and in specifying that in all public offices of the United States such a certificate should have the same effect as a judicial certificate of naturalization or citizenship, meant to put the matter at rest and to deprive all other administrative officers of the United States of the power to put in issue the citizenship status recognized by a certificate regular on its face.

Id. at 461.

[7] Immigration and Nationality Act of 1952, §103(a), 8 U.S.C. §1103(a) (1976).

[8] McDonald Testimony, Texas Open Meeting Transcript, vol. 3, pp. 93-94. The State Department informed this Commission after our Washington hearing that it believed this issue had been resolved. They stated:

> The testimony of Mr. Laurier McDonald concerning the certificates of nationality issued by the Immigration and Naturalization Service presents an issue which we understood to have been settled to the satisfaction of all parties. The Department has advised all posts that such certificates should be given presumptive weight, but that, in those unusual cases where the post has strong identifiable reason to believe that the person is not a United States citizen, the case should be referred back to the Immigration and Naturalization Service for reexamination and final determination.

Elizabeth J. Harper, Deputy Assistant Secretary of State for Visa Services, Frequently cited as examples of abuse of discretion are cases where a consular officer denies a visa on grounds that the applicant is likely to become a public charge once he or she enters the United States.[9] While the public charge provision is a proper basis for denying visas where there is reason to believe that aliens will not be able to support themselves, there were complaints that consular officers may sometimes improperly rely on this provision in a visa denial. Two immigration attorneys, Barbara Hines, a managing attorney with the Legal Aid Society of Central Texas, and Mr. McDonald, testified that consular officers deny visas on public charge grounds even though the applicants have lived in the United States and have established a record of not receiving welfare benefits.[10] Mr. McDonald alleged that public charge visa denials may be based on such ethnic characteristics as skin color.[11] However, the State Department asserted that "any statements that visa refusals are made on ethnic grounds are false."[12]

In a recent case handled by Ms. Hines involving a family of eight, one child was a United States citizen by birth, the mother had a claim to derivative United States citizenship, and the father and five children had been born in Mexico. The father and the five Mexican-born children were interviewed for visa eligibility by a consular officer. All of the applications were approved except that of the oldest child, who was 20 years old, unmarried, and 8 months pregnant. Notwithstanding her pregnancy, she was, by statute, a part of the family unit as long as she was unmarried and under the age of 21. The consular officer, however, declared her ineligible to immigrate to the United States with her family, reasoning that since she was pregnant she was, therefore, not part of the family unit. He further found that her eligibility for AFDC benefits upon the birth of her child, per se, would make her a public charge. There was substantial evidence, however, that she and her family were able to support themselves without public assistance—for the daughter had an offer of employment in the United States and the family had been living in the United States for 7 years without receiving welfare. If a Senator had not successfully requested an expedited review of the legal conclusions of the consular officer, the daughter would have been permanently separated from her family and when she reached the age of 21 would not have been legally eligible for a visa as a member of the family.[13]

Another case involved an 8-year-old Pakistani child who applied for a nonimmigrant visa because of a need to have heart surgery in the United States. The consular officer denied the visa on the grounds that the child was likely to become a public charge and that her actual intent was to remain permanently in the United States. A visa was finally obtained after several Congressmen intervened in the case, although the visa was issued from another consular post. Steven S. Mukamal, past president of the Association of Immigration and Nationality Lawyers and the attorney handling the case, concluded, "[t]hat's how powerful that American consul is when he sits at that post. He's the law."[14]

One of the primary purposes of the immigration laws is to maintain the integrity of the family unit. The denial of a visa on public charge grounds sometimes results in the separation of families, which may create new welfare recipients. Where a consular officer has denied a visa to an American family's foreign-born breadwinner, the visa denial may cause that family to seek welfare benefits in order to survive.[15]

A family immigrating to the United States may also leave some of their children behind in the care of others when the family income would not be enough to satisfy the consular officer that the family would not become public charges.[16]

The public charge provision is a difficult one to administer, requiring a consular official to make a determination based on indirect evidence and uncertain future events. Elizabeth J. Harper, Deputy Assistant Secretary of State for Visa Services, disagreed with this analysis and stated in a letter to the Commission:

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letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Sept. 6, 1979 (hereafter cited as Harper Letter).

[9] Immigration and Nationality Act of 1952, §212(a)(15), 8 U.S.C. §1182(a)(15) (1976).

[10] Barbara Hines, testimony, Texas Open Meeting Transcript, vol. 3, pp. 143–44; and McDonald Testimony, Texas Open Meeting Transcript, vol. 3, pp. 99–100.

[11] McDonald Testimony, Texas Open Meeting Transcript, vol. 3, pp. 106–07.

[12] Harper Letter.

[13] Hines Testimony, Texas Open Meeting Transcript, vol. 3, pp. 140–42.

[14] Steven Mukamal, testimony before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 14–15, 1978, p. 243 (hereafter cited as Washington Hearing Transcript).

[15] McDonald Testimony, Texas Open Meeting Transcript, vol. 3, pp. 97–100.

[16] Hines Testimony, Texas Open Meeting Transcript, vol. 3, p. 143.

> The evidence on which public charge determinations is made is not indirect and uncertain. Applicants must present documentation which demonstrates that they will be able to support themselves and their family in the United States. Consular officers are of all educational backgrounds, almost always with a college degree and frequently with advanced degrees. They do not rely solely upon their own judgment, education, or experience in administering the public charge provisions of the law, as they have access to cost-of-living indices published by other U.S. Government agencies as well as Department of State guidelines. The Department stresses world-wide uniformity in these and all other cases through training programs, consular conferences, visa workshops, and Departmental instructions.[17]

She did testify, however, that the determinations to be made regarding the financial or economic status of applicants, or the possibility that they may become a public charge in the future, generally require the expertise of economists or social scientists, while some consular officers may have only high school educations.[18] President Eisenhower in the early 1950s criticized this law, which burdened consular officers with forecasting unpredictable events, and recommended that Congress explore the possibly harsh consequences of a provision which allowed consuls so much discretion.[19]

By providing that a consular officer shall exercise discretion in acting upon visa applications, and by defining the limits of that discretion in terms of a "reasonable person,"[20] the State Department recognized that a reasonable exercise of discretion is necessary to a fair determination of the merits of each case, based upon equities and facts that an individual consular officer can determine in a face-to-face interview with the applicant.

However, the Visa Office has acknowledged that discrepancies and differences in consular officers' attitudes and decisions concerning interpretation of the public charge provision do exist between various consular posts. It has attributed such inconsistent decisions to insufficient guidelines for public charge cases and to the subjective attitudes of consular officers.[21] Thus, the Visa Office is considering corrective changes, including issuing more specific guidelines, workshops to train officers in the proper handling of the public charge provision, and a short survey of visa denials by supervisory officers.[22]

To bring accountability, consistency, and due process to the consular decisionmaking process, the Association of Immigration and Nationality Lawyers (AINL) has argued for a more adequate review of visa refusals. The State Department, although conceding that "discrepancies and differences in attitude and decision exist," opposes centralized review by the Visa Office and favors issuance of more specific guidelines.[23] As of September 1978, however, this problem remained uncorrected.[24]

The lack of uniform decisionmaking in the visa issuance process is attributable in part to the quality of the consular work force itself. The State Department, after conducting "a comprehensive review of the consular functions in the Department" in 1977, submitted to the House Committee on International Relations a report that recognized the "unevenness" in the performance of consular officers.[25] The report concluded that inadequate training, lack of "sensitive supervision," insufficient qualification standards for the appointment of consular officers, and an inadequate "selection-out-process" for consular officers who perform unsatisfactorily are some of the factors contributing to the variance in consular officers' performance. The Department stated that it would initiate a program to remedy this problem, including a "special effort" to improve the training provided to officers.[26]

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[17] Harper Letter.

[18] Elizabeth Harper, Deputy Assistant Secretary of State for Visa Services, testimony, Washington Hearing Transcript, pp. 199–200.

[19] President Dwight D. Eisenhower stated:

> In the State of the Union Message I pointed out that "existing legislation contains injustices." Among the administrative provisions of the law which it is claimed may operate with unwarranted harshness are the following:
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> The provisions which make inadmissible any alien who, in the opinion of the consul, is likely to become a public charge at any time in the future. This places upon the consul the burden of forecasting events which cannot be predicted and, it is claimed, would permit abuse of discretionary judgment.

President Eisenhower, letter to Senator Arthur V. Watkins, Chairman of the Immigration and Naturalization Subcommittee of the Senate Judiciary Committee [prior to its 1953 hearings], Apr. 6, 1953, as reprinted in Milton R. Konvitz, *Civil Rights in Immigration* (1953), appendix III, p. 190.

[20] 22 C.F.R. §§41.90 (1979).

[21] Association of Immigration and Nationality Lawyers, Visa Practice Committee, Report of Meeting with Visa Office, U.S. Department of State, Sept. 28, 1978, p. 5.

[22] Ibid.

[23] Ibid. "The Visa Office indicated that for the time being it would adhere to the position that centralized review at the Visa Office of 212(a)(15) refusals could not and would not be implemented. However, it did agree that discrepancies and differences in attitude and decision exist between the various Posts. . . .Accordingly V[isa] O[ffice] proposes to issue more specific guidelines to the field. . . ."

[24] Ibid. The AINL report of that meeting stated that "[t]he subject was fully explored and concluded with the reiteration by the V[isa] O[ffice] of the fact that it appreciated that there is a lack of uniformity of decision and that it is in the process of taking vigorous direct action to correct this."

[25] U.S., Department of State, "Report of the Consular Functions of the Department of State" (December 1977), p. 7.

The Consular Officers' Association, an informal organization of Foreign Service and GS consular specialists, has stated that the training provided to consular officers is insufficient, particularly in the areas of language training and area studies.[27] Although the State Department has taken a "forward-looking attitude" towards training and has greatly improved the basic training course for junior officers, it has apparently not placed enough emphasis on the importance of foreign language proficiency and a familiarity with area culture and politics in consular work.[28]

Reviewability of Consular Visa Decisions

Witnesses at the Commission's State Advisory Committee open meetings and at the Washington hearing of the United States Commission on Civil Rights expressed dissatisfaction with the current visa application procedure. According to testimony, one of the worst problems encountered in the entire immigration process is an inadequate system for review of consular visa decisions. Benjamin Gim, a New York immigration attorney and former president of the Association of Immigration and Nationality Lawyers, stated at the Washington hearing:

> I would say that the most serious thing is the power which is vested in the American consul to issue or refuse a visa, and that decision is not reviewable by even the Secretary of State, and it certainly is not reviewable in the courts. Congress has, by implicit legislation—I think it's Section 104—has excluded the consul. A relatively petty official, a vice consul, for instance, his decision on whether to issue a visa or not is not reviewable by the Department of State Visa Office, except as to questions of law, but a question of fact is not reviewable by the Secretary of State, and it cannot be overturned, no matter how unjust, even in court. And I think that's one crying area where there is such a potential for abuse, and it is being abused, that it needs reform.[29]

Sister Adela Arroyo, director of Catholic Services for Immigrants in San Antonio, Texas, testified:

> [M]any times the gravest and greatest problems are with the U.S. consuls who are under the State Department. The consuls operating in a foreign land become like kings in their own domain. Even the Secretary of State does not have the authority to direct a consular officer to grant or refuse a visa. And in addition, a refusal by a consular officer to issue a visa is not reviewable by the U.S. court system.[30]

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[26] The report stated:

> The quality of the consular work force needs to be strengthened. While most consular officers are dedicated professionals who are performing their responsibilities in an exemplary manner, there are some who are not as effective. The basic reason for this unevenness can be traced to shifting personnel policies over the years as regards the consular force. This in turn is attributable to the previously widely held attitude that consular work did not require the high degree of professionalism necessary in other functions. Thus, the Department has at times used the consular function for the placement of officers unsuccessful in other functions. There has also been a tendency to place into the consular cone most of the officers who enter the Service laterally. Some of these have been handicapped by lack of background, sufficient training, and sensitive supervision.
>
> The Department is initiating a concerted program to remedy this quality problem. Greater emphasis will be placed on higher qualifications for officers appointed to consular activities. Once they have entered on active duty the Department will make a special effort to provide regular training to these officers to expand and update their skills; and to assure that they benefit from careful supervision and career development opportunities. Finally, there will also have to be an improved selection-out process for those officers whose performance over a period of time and in more than one work environment does not measure up to the high standards required of the consular function in the current situation.
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> For those officers now in consular work the expanded training programs discussed elsewhere in this report will give them needed opportunities to improve their skills. We also will place greater emphasis on more effective supervisory attention.

[27] Wayne S. Leininger, chairman, Consular Officers' Association, letter to the Office of the General Counsel, U.S. Commission on Civil Rights, Dec. 11, 1978.

[28] Ibid., pp. 2–3. Mr. Leininger, on behalf of the COA, stated:

> The Department has, in our opinion, taken a forward-looking attitude toward the training of consular officers. More consular officers are now in university training, economic training, or at various senior government seminars than ever before. The Foreign Service Institute now offers three times a year an advanced consular course to mid-career officers that focuses heavily on managerial topics, and will soon begin a series of overseas consular workshops and supervisory seminars. Junior officer basic training has been vastly improved with the experimental "ConGen Rosslyn" approach.
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> Yet, consular officers still have difficulty in acquiring the necessary amount of language training and area study before going to post. Work pressure plays a part in this: there is simply not enough time to devote to another six or 12 weeks of language training when the post needs another visa officer *now*. Further, the designation of certain positions at posts abroad as requiring the incumbent to have a certain degree of language proficiency—the "language-designated position" (LDP) program—is left in the hands of senior DCM's or Ambassadors who themselves have an incomplete grasp of the complexities of consular work in the 1970's.
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> Lastly, the Department's traditional view of consular work as a technical and functional specialty—as opposed to a "substantive" one, such as political analysis—has for some reason led it to conclude that area specialization is not in order. This attitude seemingly ignores the cultural and political differences in the host country milieu that make consular work in Santo Domingo a distinctly different activity than consular work in Amsterdam [emphasis supplied in the original].

[29] Benjamin Gim, testimony, Washington Hearing Transcript, p. 24.

[30] Sister Adela Arroyo, testimony, Texas Open Meeting, Transcript, vol. 5, p. 17.

When an application for a visa is denied, State Department regulations provide for a rudimentary system of review of that denial,[31] generally consisting of a reevaluation of the case by the principal consular official or supervisory consular officer. That officer, under the regulations, can reach one of three decisions: (1) concur with the junior consular officer in denying the visa, in which case the visa application is retained in the permanent files of the consular office and no further action is taken, (2) conclude that the denial is unwarranted and assume responsibility for the particular case and issue the visa or discuss the conclusion with the junior officer to persuade him to reverse the original decision, or (3) disagree with the determination and request guidance from the State Department in making a decision. If guidance is requested, the case would be forwarded to the Visa Office of the State Department in Washington for an advisory opinion or for a departmental ruling from an appropriate official of the Bureau of Consular Affairs.

Even without a specific consular request, the State Department may initiate a review of a visa application[32] and issue an advisory opinion to the consular officer for consideration. However, regardless of who initiates the review, rulings of the State Department are only binding as to questions of law. Questions of fact are left to the absolute discretion of consular officers.[33]

Other than this limited supervisory review, the Secretary of State is clearly prohibited by statute from considering the issuance or denial of visas in individual cases. The Secretary of State is given supervisory authority over consular activities in administering and enforcing the immigration laws "*except [for] those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas*" (emphasis added).[34] A party aggrieved by a consular decision is also denied access to Federal court to seek redress, since courts have consistently held that, without explicit statutory language authorizing such review, visa refusals are immune from judicial scrutiny.[35]

Elizabeth J. Harper, Deputy Assistant Secretary of State for Visa Services, testified that the review process begins when the supervisory consular official, normally the chief of the consular section, reviews the paperwork of each visa denial case, looking at the case anew by examining the files and other materials presented by the junior consular officer to determine whether "good judgment" was exercised. If necessary, the consular officer will request additional information from either the applicant or the junior officer prior to making a determination, but such requests are rare, according to Ms. Harper, because "most denials are well-documented."[36] She acknowledged that applicants who have been denied visas receive no notification of the subsequent review of their application "unless they ask about it," and that applicants and/or their legal or personal representatives have no automatic access to the review process.[37] A visa denial may be appealed to a superior officer if the applicants demand to see a higher ranking official, and, although there is no absolute requirement that attorneys be allowed to participate in the review process, permission may be granted for an attorney to accompany an applicant who has gained access to a reviewing consular official. Ms. Harper characterized the current review process as "a modest appellate system in order to ensure that there are no abuses by consular officers. . .not really to weed out officers as much as to preclude injustice to the applicants."[38]

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[31] For nonimmigrant visas, State Department regulations provide:

> (b) Review of refusals at consular offices. If the grounds of ineligibility upon which the visa was refused cannot be overcome by the presentation of additional evidence, the principal consular officer at a post, or an alternate whom he may specifically designate, shall review the case of an applicant who has been refused a visa and shall record his decision over his signature and the date on a form prescribed by the Department. If the ground of ineligibility may be overcome by the presentation of additional evidence, and if the applicant has indicated that he intends to obtain such evidence, a review of the refusal may be deferred for a period not to exceed 120 days. If the principal consular officer, or his alternate, does not concur in the refusal, he shall (1) refer the case to the Department for an advisory opinion or (2) assume responsibility for the case himself.

22 C.F.R. §41.130(b) (1979). For immigrant visas, State Department regulations provide:

> (b) Review of refusals at consular offices. The principal consular officer at a post, or an alternate whom he may specifically designate, shall review without delay the case of each applicant who has been refused a visa and shall record his decision over his signature and the date on a form prescribed by the Department. If the principal consular officer, or his alternate, does not concur in the refusal, he shall (1) refer the case to the Department for an advisory opinion, or (2) assume responsibility for the case himself.

22 C.F.R. §42.130(b) (1979).

[32] Although it is not stated in its regulations, the State Department has indicated that such a review may be upon "its own initiative or at the request of interested parties." Harper Letter.

[33] State Department regulations provide:

> (c) Review of refusals by Department. The Department may request a consular officer in an individual case or in specified classes of cases to submit a report if a nonimmigrant visa has been refused. The Department will review such reports and may furnish an advisory opinion to the consular officer for his assistance in giving further consideration to such cases. If upon the receipt of the Department's advisory opinion the consular officer contemplates taking action contrary to the advisory opinion, the case shall be resubmitted to the Department with an explanation of the proposed action. Rulings of the Department concerning an interpretation of law, as distinguished from an application of the law to the facts, shall be binding upon consular officers.

22 C.F.R. §41.130(c) (1979) (although this section applies only to nonimmigrant visas, 22 C.F.R. §42.130(c) (1979) provides for similar review of immigrant visas in almost the identical language). Although advisory opinions may not be binding on consular officers, the State Department asserted that:

> In practice the consular officer in the field is considered to be the best judge of the facts of the case and the Department's advisory opinions are restricted to advice as to the application of the law to the facts. While in a legal sense an advisory opinion is not controlling on the individual consular officer's action, we have experienced only rare and isolated instances where the Department's opinion was not accepted.

Harper Letter.

[34] Immigration and Nationality Act, §104(a), 8 U.S.C. §1104(a)(1976).

[35] Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929), *cert. denied*, 279 U.S. 868 (1929) (holding that consular visa decisions are nonreviewable absent an express statutory provision); Licea-Gomez v. Pilliod, 193 F. Supp. 577 (N.D. Ill. 1960) (holding that the statutory scheme provided by Congress for excluding aliens, whatever it is, is due process, citing Knauff v. Shaughnessy, 338 U.S. 537 (1949), and that only congressional action could remedy the statutory scheme); Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961) (where the court recognized in a footnote the immunity of consular visa decisions from review, citing Ulrich v. Kellogg).

[36] There is evidence, however, that there is insufficient documentation of

Immigration practitioners, however, often disagree with the conclusion that the existing review system is adequate to preclude injustice to applicants and have criticized its failure to ensure that aggrieved parties[39] are accorded the procedural safeguards that are available in other settings under traditional due process doctrine. Immigration attorney Laurier McDonald, in his testimony on the consular visa process, stated:

> The American process stops at the threshhold of the American consulates abroad. I have never seen any other phase of the Federal agencies anywhere to measure up to the lack of due process that exists within the American consulates and the American embassies abroad. This not only includes Mexico, this is anywhere in the world.[40]

The former president of the Association of Immigration and Nationality Lawyers, Steven S. Mukamal, supported this view:

> every once in a while you do have a consular officer who will lose sight of the purpose of why he's there and function outside the law, the existing law, and there's nothing that you or I could presently do about it. . . .It does not sit right with me that this country which has a democratic process should permit this type of system to continue and it absolutely requires change.[41]

At a minimum, due process requires that an aggrieved party receive notice of the review procedure, an opportunity to be heard, and the right to an appeal or review of an inequitable or unjust decision.[42] The present system of review for consular visa decisions does not adequately provide these due process safeguards to an aggrieved party. In fact, the picture that emerges of the current review of visa denials is that of a relatively informal process in which visa applicants generally do not participate.[43] Other Federal Government agencies, even where issues of lesser impact than the separation of families are at stake, have established formal appellate review systems for the denial of benefits under our laws that accord greater rights of due process.[44]

In its own examination of the visa application process, the State Department reached findings that support the need for an improved appellate system beyond the perfunctory review that currently exists. After conducting its internal inspection and review of the consular function, the State Department

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the grounds for some visa denials. For example, a visa may be denied under Section 212(a)(19) of the act where an applicant is believed to have used fraud or misrepresentation in attempting to secure a visa. It appears that the facts giving rise to a 212(a)(19) denial, when based on oral statements by an applicant, are not fully recorded in writing. The Visa Office has currently taken under advisement a recommendation by the Association of Immigration and Nationality Lawyers (AINL) that such facts be reduced to writing and be made available to interested parties. AINL, Visa Practice Committee, Report of Meeting with Visa Office, U.S. Department of State, Sept. 28, 1978, p. 6.

[37] There is also no right to assistance of counsel in the initial immigrant visa interview. Under the current policy of the Visa Office of the Department of State, each consular officer may determine on an individual basis whether to allow an attorney to accompany and assist a visa applicant in the visa interview. The Visa Office has informed immigration attorneys that it will not mandate or require the presence of counsel where the consular officer objects to his presence. Association of Immigration and Nationality Lawyers, Visa Practice Committee, Report of Meeting with Visa Office, U.S. Department of State, Sept. 28, 1978, p. 4. On the other hand, 8 U.S.C. §1362 (1976) allows legal representation, at no expense to the Government, during other immigration proceedings.

[38] Harper Testimony, Washington Hearing Transcript, pp. 195–96, 204.

[39] "Aggrieved parties" includes persons other than the visa applicant. Persons adversely affected by a visa denial are often United States citizens or legal residents and American business enterprises. A visa denial can prevent the reunification of families, the primary objective of the Immigration and Nationality Act of 1952, or could result in the loss of the principal or sole breadwinner for an American family. It could also mean the unavailability of technical expertise that an American business seeks.

[40] McDonald Testimony, Texas Open Meeting Transcript, vol. 3, p. 92.

[41] Mukamal Testimony, Washington Hearing Transcript, p. 243.

[42] Of course, the review or opportunity to be heard must be meaningful; that is, the aggrieved party must be allowed to argue fully and fairly the merits of his or her case.

[43] As previously noted, there is neither a requirement of notice to the denied visa applicant that a review will be conducted nor a right of automatic access to the reviewing officer by the denied applicant and/or his or her personal or legal representative. Still, a denied visa applicant may gain access to the review process by making a demand, or he or she may be given notice and granted limited participation in the review when the reviewing officer requests additional information.
A request for additional information, however, does not always guarantee the participation of the denied visa applicant in the review process. Additional information requests can be directed to the subordinate consular officer, and thus a denied applicant who is unaware of the review process presumably would have no knowledge of such a request.

[44] *E.g.*, Internal Revenue Service. 26 C.F.R. §601.106(1978).

concluded, generally, that some consular officers were inadequately trained and supervised[45] and recognized inconsistencies in the performance of consular officers, attributable, in part, to the subjective attitudes of officers and to the absence of adequate guidelines for decisionmaking.[46]

A review procedure is necessary to help ensure that the law will be applied equally and consistently to all visa applicants, but the present review system does not ensure that result. Although the Deputy Assistant Secretary of State for Visa Services testified that all visa denials are "reviewed by regulation,"[47] the President's Reorganization Project of the Office of Management and Budget, in its analysis of the review procedures for visa denials, concluded that "only a rudimentary appeals process exists and is rarely used."[48] Furthermore, the lack of adequate supervision, as noted in the State Department's own review of the consular function, raises serious doubts as to the effectiveness of the current supervisory review. The Consular Officers' Association, which has been critical of the overall supervision of the consular function, stated:

> Consular sections at posts overseas are notoriously thinly-layered. As a consequence, the officer whose main occupation ought to be the supervision of the junior officers and the general management of the consular program is more often than not pressed into duty as a caseworker, eight hours a day.
>
> That presupposes, however, that a nominal supervisory consular officer exists. Actually, at about one-fifth of the posts in which consular work is performed, there is no full-time consular officer, let alone supervisor. At an additional one-third, there is but one consular officer, who is almost invariably on his or her first or second tour and who, at such posts, is most likely to have the least qualified and helpful local national staff. An additional one-sixth of all consular establishments are two-officer operations, with the senior-most of those being no more than 0-5 and more frequently, an 0-6. In offices such as these—over two-thirds of all consular sections—the only available senior supervision comes from officers whose own consular experience dates from 20 years ago when *they* were junior officers.
>
> At posts such as these—and even at some larger missions at which local practices may have come to dominate what is regarded as standard procedure—the ability of the Inspection Corps to function as an instrument that assures equitable and consistent application of law and regulation and provides helpful insight into consular management problems is paramount. Sadly, the Inspector Corps itself has not been able to staff its teams with senior, experienced consular officers, primarily because there simply are not enough of them to go around.[49]

The current review process is more akin to a managerial review than an appellate review. Broadly speaking, a managerial review is a unilateral appraisal by a supervisor of the performance of a subordinate employee to determine whether the work product is proper and efficient, whereas an appellate review is generally a more formal process wherein an administrator, judge, or other arbiter resolves a dispute after both parties have been given due notice and an opportunity to argue and support their respective contentions. Under present review procedures for visa denials, the supervisory consular officer reviews only the decision of the junior consular officer by examining the paperwork of the case to determine whether good or bad judgment was exercised,[50] unless a denied visa applicant is aware of the review process, demands access, and is granted an opportunity to defend the merits of his or her case.[51]

Inadequate training and the lack of uniform decisionmaking in certain types of cases support the need for reviewability of consular visa decisions. Similarly, the inadequacy of the supervision and the absence of procedural safeguards under traditional due process doctrine necessitate the establishment of a formal review process beyond the current managerial review.

One area in which appellate review should be available is the situation where consular officers retain original documents submitted by an applicant in support of the visa application.[52] According to Ms. Harper, documents presented with an application are retained if a visa is denied and the document is germane to the refusal. Although she was unaware of any request for recovery of retained documents, Ms. Harper admitted that there is no State Department instruction or process whereby an applicant can recover original documents that the applicant asserts are neither fraudulent nor in his or her wrongful possession.[53]

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[45] U.S., Department of State, "Report of the Consular Functions of the Department of State" (December 1977), p. 7.

[46] For example, the Visa Office has recognized, at least with respect to visa denials on public charge grounds (section 212(a)(15) of the act), that a lack of uniform decisionmaking might be the result of such factors. AINL, Visa Practice Committee, Report of Meeting with Visa Office, U.S. Department of State, Sept. 28, 1978, p. 5.

[47] Harper Testimony, Washington Hearing Transcript, p. 195.

[48] James T. McIntyre, Jr., Office of Management and Budget, memorandum [on law enforcement, border management, and immigration policy reorganization] to President Carter, June 1, 1978.

[49] Wayne S. Leininger, chairman, Consular Officers' Association, letter to the Office of the General Counsel, U.S. Commission on Civil Rights, Dec. 11, 1978, pp. 4-5.

[50] Harper Testimony, Washington Hearing Transcript, p. 196.

[51] Ibid., pp. 195-96.

One frequently overlooked problem of the current review process is the protection of the rights of American citizens, legal residents, and business enterprises. An examination of the consular review process usually concentrates exclusively on the rights available to the denied visa applicant, although "[f]or the most part, the aggrieved party in this instance is not necessarily the alien abroad but it would be the petitioner in the United States."[54] Milton R. Konvitz, in his book *Civil Rights in Immigration,* described the situation:

> As matters stand now, in every situation involving an alien knocking on our door for admission, attention is focused only on the alien. He may seek entry because he has been invited by a son or a father, or other close relative, or by a distinguished university, or by a responsible church or synagogue, or by a committee of famous scholars who are planning an international conference. Such circumstances may, in some instances, put the alien in a preferred class substantively, but procedurally such facts will make little difference. The case never becomes one involving the rights of the American citizens who seek the alien's admission. The sponsoring citizens do not enjoy any special legal status or rights in the proceedings.[55]

In discussing a case in which he sponsored a French scholar for admission, Mr. Konvitz noted that "[t]here was not the slightest evidence of an awareness that the sponsor, an American citizen, had any legitimate interests, let alone rights, that deserved respect."[56]

The dissenting opinion of Mr. Justice Frankfurter in *Knauff* v. *Shaughnessy* recognized that Congress, in enacting the War Brides Act, had "extended the privilege for the benefit not of the alien but of her American husband."[57] Similarly, the current immigration selection system is designed to benefit Americans and American businesses. The preference system gives the greatest priority to the reunification of American citizens and legal residents with their families living abroad. American businesses are given the next greatest priority so they may achieve the admission of certain foreign nationals with professional or technical skills that are needed. The benefits derived from a visa issuance, whether the pursuit of qualified employees or the "preservation of family units,"[58] are indeed substantial. Similarly, the harmful effects of a visa refusal are also substantial. Americans who have suffered an injury from an adverse consular visa decision should be entitled to have some redress. Any aggrieved party, not merely the denied visa applicant, "should be recognized as having sufficient interest in a visa application case to have standing to take an appeal."[59]

Findings and Recommendations

Finding 4.1: It would be sound procedural practice for all consular officers to prepare written memoranda of their decisions on visa applications that set forth fully their conclusions and the evidence supporting their conclusions. In cases where the decisions of the consular officer are challenged, the written memoranda would facilitate the review process.

Recommendation 4.1: The Secretary of State should promulgate regulations that require each consular officer to record in written memoranda a detailed statement of the reasons for the decision on each visa application.

Finding 4.2: The current Department of State process for the review of consular visa denials does not adequately protect aggrieved parties from improper exercises of consular discretionary authority.

Although the denial of a visa effectively bars a person from legally entering the United States, the visa application process does not contain adequate procedural safeguards to ensure that visa applicants receive a full and fair hearing on the merits of their case and that the final decision is free from an arbitrary exercise of discretionary authority by a consular officer. Except for the current, limited, managerial-type review, there is no other review for certain exercises of consular discretionary authority. Factual determinations by consular officers, no matter how arbitrary, are not reviewable by the Secretary of State or administrative designees of the Secretary or through the judicial process.

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[52] Ibid., p. 206. Cornelius D. Scully, Chief of the Regulation and Legislative Branch of the Visa Office, stated, however, that he "assumed" that an arrangement could be made to make a copy of the original for the consular file "if the applicant needed" the original. Scully Testimony, Washington Hearing Transcript, p. 206.

[53] Harper Testimony, Washington Hearing Transcript, p. 207.

[54] Mukamal Testimony, Washington Hearing Transcript, p. 237.

[55] Milton R. Konvitz, *Civil Rights in Immigration* (1953), p. 78.

[56] Ibid., p. 79.

[57] Knauff v. Shaughnessy, 338 U.S. 537, 549 (1949).

[58] *NOTE,* "Judicial Review of Visa Denials: Re-examining Consular Nonreviewability," *New York University Law Review,* vol. 52 (1977), pp. 1137, 1154.

[59] American Jewish Committee, *Americanizing Our Immigration Laws* (1949), as cited in Konvitz, *Civil Rights in Immigration,* p. 79, n. 208.

Even conscientious and dedicated consular officers can make mistakes of law or fact. Both the Department of State and the Consular Officers' Association have recognized and admitted that the performance of consular officers is, at times, uneven. Notwithstanding, aggrieved parties who have suffered from an abuse of consular discretionary authority often have no redress from that error.

The consequences that can arise from a visa denial mandate a more formalized review process that provides for greater due process. As the Board of Immigration Appeals stated in the *Matter of S– and B–C–*, 9 I & N 436, 446 (1960) (quoting the Report of the President's Commission on Immigration and Naturalization, January 1, 1953, p. 177):

> Shutting off the opportunity to come to the United States actually is a crushing deprivation to many prospective immigrants. Very often it destroys the hopes and aspirations of a lifetime, and it frequently operates not only against the individual immediately but also bears heavily upon his family in and out of the United States.

The adoption of a more formal system of review would make consular officers accountable for their decisions and would be consistent with the current appellate practices of other Federal agencies.

Recommendation 4.2: Congress should amend the Immigration and Nationality Act to vest the visa-issuing authority in the Secretary of State and to further authorize the Secretary of State to create a Board of Visa Appeals,[80] similar in function to the Board of Immigration Appeals.

The Board of Visa Appeals should be vested with the jurisdiction to hear appeals of consular visa denials wherein the action, findings, and/or conclusions of the consular officer with respect to a visa application are alleged to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The function of such a Board would be particularly important in immigrant visa cases that affect the reunification of United States citizens and legal residents with families abroad and the loss of technical and professional skills by American businesses. Any aggrieved party, including American citizens, legal residents, and businesses, should have standing to file an appeal from an adverse consular visa decision. The Board, through a majority vote, should have the power to affirm, to remand for further factfinding, or to reverse a consular visa refusal in any case. The Board should deliver its decision in writing and transmit copies to the Bureau of Consular Affairs of the Department of State and to the denied visa applicant or other aggrieved party(ies) who filed the appeal. In unusual circumstances, the Secretary of State for good and compelling reasons should have the authority to overrule a decision of the Board of Visa Appeals.

Finding 4.3: The arbitrary exercise of discretionary authority by consular officers can be attributed, in part, to deficiencies in the Department of State training program for consular officers.

Inadequate training and supervision of consular officers is one cause of the lack of uniform decision-making in the consular visa process. The Department of State and the Consular Officers' Association have recognized the need for improvement in this area. To correct this problem, the Department has upgraded its consular officer training program. According to the Consular Officers' Association, however, deficiencies in language and area studies training still persist.

Recommendation 4.3: The Department of State should continue to place emphasis on the improvement of training programs for consular officers. These improvements should include more thorough language training and more extensive area studies courses on the culture and politics of the particular country to which the consular officer has been assigned.

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[80] The creation of a Board of Visa Appeals was suggested as early as 1955 by the Administrative Law Section of the American Bar Association. That recommendation was adopted by the Administrative Law Section in the form of a resolution which stated:

> Resolved, that the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:
>
> "Be it Resolved, that it is the opinion of the American Bar Association that there be established a Board of Visa Appeals with power to review the denial by a consul of a visa and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end."

Administrative Law Bulletin (July 1955), vol. 7, p. 236.

The recommendation was later approved by the Board of Governors of the American Bar Association. 81 Reports of the ABA 426 (1956).

EMPLOYER SANCTIONS

Chapter 5[*]

Employer Sanctions Legislation

Introduction

As a result of current economic and employment conditions within the United States, increasing national attention has been focused on the presence of undocumented workers in this country. Many studies have been undertaken in the public and private sectors to ascertain the number of undocumented workers residing in the United States and their effect upon the American labor market and economy.[1] Although those studies indicate that accurate or precise statistics are not available,[2] they generally agree that there is a significant undocumented worker population in the United States.[3]

There is less unanimity, however, on the labor market impact of undocumented workers. The studies do agree on several preliminary assumptions. None of the studies questions the assertion that nationals of foreign countries have entered this country without proper documents or that some foreign nationals have remained in this country beyond the expiration date and/or terms of their visas. Similarly, there is no question that a number of these undocumented aliens obtain employment. The unresolved question is what degree of economic impact undocumented workers have on American workers.

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[*] Commissioners Stephen Horn and Frankie M. Freeman have dissented from some of the recommendations accompanying this chapter. For their comments, see "Additional Statement by Vice Chairman Stephen Horn" and "Separate Statement of Commissioner Frankie M. Freeman."

[1] Although this is by no means an exhaustive list, some of the studies which have been conducted on the issue include: U.S., Departments of Justice, Labor, and State, Interagency Task Force on Immigration Policy, *Staff Report Companion Papers* (1979); Charles B. Keely (of the Population Council), *U.S. Immigration: A Policy Analysis* (1979); Paul R. Erhlich, Loy Bilderback, and Anne H. Erhlich, *The Golden Door: International Migration, Mexico, and the United States* (1979); Latin American Institute of the University of New Mexico, *The Problem of the Undocumented Worker* (1979); National Commission for Manpower Policy, *Manpower and Immigration Policies in the United States* (1978); Wayne A. Cornelius, *Illegal Migration to the United States: Recent Research Findings, Policy Implications, and Research Priorities* (1977); U.S., General Accounting Office, *Immigration—Need to Reassess U.S. Policy* (1976); U.S., Domestic Council Committee on Illegal Aliens, *Preliminary Report* (1976); David S. North and Marion F. Houstoun, *The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study* (1976).

[2] *See, for example:* Erhlich, Bilderback, and Erhlich, *The Golden Door*, pp. 182–90; Domestic Council, *Preliminary Report*, pp. 124–31; Keely, *U.S. Immigration*, p. 47; Vernon M. Briggs, Jr., "The Impact of the Undocumented Worker on the Labor Market," in *The Problem of the Undocumented Worker*, p. 33.
For an excellent review of previous studies regarding the count of the undocumented worker population and the problems which affect the accuracy of the estimates of that population made by researchers, see U.S., Department of Commerce, Bureau of the Census, *Preliminary Review of Existing Studies of the Number of Illegal Residents in the United States* (January 1980) (hereafter cited as Bureau of the Census, *Preliminary Review).*

[3] See Bureau of the Census, *Preliminary Review*, for a good compilation of the various estimates made by researchers.

Those who have examined and researched the issue can be divided into two groups.[4] One group of researchers has reached the conclusion that, because some nationals of foreign countries enter the United States and secure employment, they contribute to the severe economic displacement of American workers (i.e., United States citizens and lawful resident aliens), particularly minority-group job seekers, and to the reduction in wage levels for jobs that would otherwise be attractive to American workers.[5] On the other hand, another group of researchers, while cognizant of the high national unemployment rate, suggest that undocumented workers do not have so significant an impact on the domestic labor force.[6]

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[4] Prof. Michael J. Greenwood of the University of Arizona, in a companion paper to the Staff Report of the Interagency Task Force on Immigration Policy, termed these two distinct views as "the replacement hypothesis" and "the segmentation hypothesis." In examining the studies of various writers on the issue of the impact of undocumented workers on the domestic labor force, he noted that, irrespective of the theory they supported, concrete evidence was lacking. As he stated in his paper:

> [A]mong observers of the [undocumented worker] problem widespread disagreement exists concerning the effects of th[e] job-seeking behavior [of undocumented workers] on domestic workers.
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> Vernon Briggs [in "Mexican Workers in the United States Labour Market: A Contemporary Dilemma," *International Labour Review*, November 1975, and in "Illegal Aliens: The Need for a More Restrictive Boarder Policy," *Social Science Quarterly*, December 1975], for example, has articulated what might be termed "The Replacement Hypothesis." He asserts that [undocumented] aliens depress local wage levels and take jobs that would otherwise be held by domestic workers. William Hartley [in "United States Immigration Policy: The Case of the Western Hemisphere," *World Affairs*, Summer 1972] supports this view in arguing that [undocumented] aliens work:
>
>> . . .as farm laborers and in factory "sweatshops." They displace low income American workers, hampering unionizing efforts, encourage employers to disregard wage, hour, and working conditions statutes and generally depress the labor market.
>
> Furthermore, Michael Piore [in "Comment on 'Primary and Secondary Labor Markets,'" by M. L. Wachter, *Brookings Papers on Economic Activity* (1974)] has recently restated this position in somewhat stronger terms. He argues that [undocumented] aliens create opportunities for an underground labor market and that:
>
>> The economic incentives for such a labor market are large. In it an employer can escape minimum wage legislation, legal health and safety standards, social security taxes, unemployment insurance, working men's compensation, and income tax withholdings.
>
> He then suggests that illegal immigration has several consequences for domestic workers in secondary labor markets. In particular:
>
>> . . .the concerns of dualists with eliminating the secondary [employment]. . .sector are misplaced. The battle of the next decade will be defensive. . .to prevent the secondary sector from reverting to the conditions of the late nineteeth and early twentieth century.
>
> Other writers have stated what might be called "The Segmentation Hypothesis." J.A.R. Nafziger [in "Undocumented Aliens" (paper presented at the regional meeting of the International Association of Law, September 1975)], for example, has taken a position virtually opposite to that of Briggs by arguing that jobs occupied by the [undocumented] aliens are, by American standards, low-wage, periodic, and relatively undesirable, and are thus typically not the type that would be of interest to domestic workers. E. Abrams and F.S. Abrams [in "Immigration Policy—Who Gets In and Why?," *The Public Interest*, Winter 1975] also support the segmentation hypothesis, as indicated in the following statement:
>
>> As to the assertion that [undocumented] aliens take jobs away from Americans, there is a. . .lack of evidence. Certainly it is *not* "logical to conclude that if they are actually employed they are taking a job away from one of our American citizens"; the fact that a sizeable number of [undocumented workers] have or could get labor certifications belies that "logic" and indicates that many [undocumented] aliens are filling shortages that even the Labor Department considers genuine.
>
> The argument presented by Nafziger and by Abrams and Abrams is that the domestic labor market is sufficiently segmented that American workers are insulated from the direct employment effects of the aliens.
>
> Whether they support the replacement hypothesis or the segmentation hypothesis, none of these writers, or the many others involved in the debate, presents concrete evidence in support of his assertions.

Michael J. Greenwood, "The Economic Consequences of Immigration for the United States: A Survey of the Findings" (December 1978), prepared for U.S. Departments of Justice, Labor, and State, Interagency Task Force on Immigration Policy, *Staff Report Companion Papers* (August 1979), pp. 49–50.

[5] One immigration expert whose views are representative of this group is Prof. Vernon Briggs, Jr. He has stated:

> Actually, the precise number [of undocumented workers residing in this country] "is irrelevant" if one concedes—as everyone familiar with this issue does—that the number of people involved is substantial and that the direction of change is toward annual increases. . . .
>
> All the research on the characteristics of [undocumented] aliens shows that the major reason they come is to find jobs. [footnote omitted] The evidence also indicates that they are largely successful in their quest. . . .
>
> In the local labor markets where [undocumented] aliens are present, all low-income workers are hurt. Anyone seriously concerned with the working poor of the nation must include an end to illegal immigration as part of any national program of improved economic opportunities.

Briggs, *The Impact of the Undocumented Worker on the Labor Market*, pp. 33–34.

According to a recent *New York Times* article, this point of view is reflected in a yet to be published study of the Department of Labor entitled "1979 National Longitudinal Survey of Youth Labor Market Experience," *New York Times*, Feb. 29, 1980, pp. A1, A14.

See also the discussion of "the replacement hypothesis" in note 4.

[6] Some immigration researchers have concluded that undocumented workers generally take those jobs that Americans do not want because they are the least desirable and offer little opportunity for advancement. See, for example, Cornelius, *Illegal Migration to the United States*, pp. 8–9.

The authors of a more recent immigration study stated:

> While [former INS Commissioner] Chapman and others maintain that for every employed [undocumented alien] there is an unemployed American or legal immigrant, there are people who hold the opposite view. They argue that the availability of low-paying jobs causes the flow of [undocumented aliens]. They claim, that, if the [undocumented workers] were not economically needed in the work force, they would not be here in the numbers they are, and they would not have been here for so long. . . .Some honest and very promising work is now being done on the question of "job displacement," that is, [undocumented workers] displacing legal residents from employment. That work, though, is limited, preliminary, and exploratory. Its results do not describe the "real world" any more than did the old INS estimates, and those doing the work would not claim that it does.

Erhlich, Bilderback, and Erhlich, *The Golden Door*, pp. 193–95. They further noted that "[t]here are three major arguments for the premise that exclusion of [undocumented] workers would not add appreciably to the number of jobs available to Americans." Ibid., p. 195. One of these major arguments is that jobs occupied by undocumented workers would disappear due to automation or mechanization. Another major argument is that businesses may relocate in other countries or areas where labor costs would be substantially less. And third, it is argued that the ouster of undocumented workers would actually increase unemployment, for many marginal businesses or businesses in declining industries that employ undocumented workers may be forced to shut down and thus place management employees in the unemployment lines. Ibid.

And finally, although not discounting that some degree of displacement occurs, Charles B. Keely of the Population Council stated in a recent research study: "Finally, we should not attribute to international migration an exaggerated effect on U.S. employment. The unemployment rates in the United States are not primarily the result of illegal migration." Keely, *U.S.*

Because of methodological problems in designing studies of undocumented worker participation in the labor market,[7] the research findings of any one particular study or set of studies have limited usefulness for reaching conclusive determinations regarding the degree of economic impact of undocumented workers. Nevertheless, the number of studies and their scope are indicative of the serious national concern over the undocumented worker issue.

The Commission concludes, on balance, that it should be recognized that the presence of undocumented workers in the labor market does have an adverse impact on the opportunities for employment of a number of citizens and legal residents.

A Positive Response to the Problem

The Federal Government, in the judgment of this Commission, should do everything possible to reduce significantly the number of undocumented workers in our domestic labor market, particularly in those areas where they have an adverse impact on the employment opportunities of citizens and legal residents.

First, the Commission believes that there should be a vigorous enforcement of the Fair Labor Standards Act.[8] It is alleged that some employers employ undocumented workers instead of legal resident aliens or citizens because they know that the fear of detection will deter undocumented workers from filing complaints relative to poor working conditions. An effective enforcement of the Fair Labor Standards Act can help to reduce the attractiveness of such a choice and at the same time help to ensure that neither citizens nor aliens are subject to unfair working conditions.

Second, we believe that there must be a substantial increase in the resources made available to the Immigration and Naturalization Service and to other agencies that may assume responsibilities in the future for the enforcement of immigration laws.

Such increased resources should be utilized not only for the purpose of expanding, for example, the Border Patrol but for conducting vigorous recruiting programs consistent with equal employment opportunity objectives, for the improvement of training programs, and for taking full advantage of technological progress in the area of law enforcement.

This Commission believes that our nation has the capacity of initiating a program of stepped-up law enforcement in the immigration area and at the same time conducting it in such a manner as to protect the civil rights of all persons who may be the targets of such a program.

We recognize that this is not a good time to recommend the expansion of the resources of any governmental program. Nevertheless, a substantial investment in an expanded and improved law enforcement program by the Immigration and Naturalization Service will produce benefits in the form of increased job opportunities for both citizens and legal residents that will far outweigh the costs.

Foreign Policy Can Be an Important Factor in Dealing with the Problem

Third, we cannot afford—because of its seriousness—to turn our backs on the foreign policy aspects of the problem. In the 1942–47 period, for example, a U.S.-Mexican executive agreement played a major part in determining the role that Mexicans would play in the U.S. labor market.[9] Both governments were involved in the implementation of the agreement.

It is recognized that the current situation is very different from the situation that prevailed in both countries in those years. Nevertheless, working agreements to improve the regulation of the population flow between the United States and the major source countries for undocumented workers could help to get at the root of some of our current difficulties. The complexities and difficulties involved in developing such working agreements should not be used as excuses for failing to try to work them out if we are really convinced that the number of undocumented workers continuing to come to this country is having an adverse impact on the economic well-being of many of our citizens and legal residents.

Efforts to negotiate such agreements would have to be made simultaneously with efforts to deal with other outstanding issues between the United States

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Immigration, pp. 59–60.

See also the discussion of the "segmentation hypothesis" in note 4.

[7] For a discussion of some methodological problems which generally confront researchers studying undocumented workers, see Bureau of the Census, *Preliminary Review*.

[8] 29 U.S.C. §§201–219 (1976 and Supp. I 1977).

[9] For a more detailed discussion of the bracero program, see Richard B. Craig, *The Bracero Program* (1971).

and the other nations, the resolution of which would represent gains for all parties to the negotiations.

At a recent conference on the undocumented worker issue sponsored by the Community Services Administration, immigration experts who participated in the conference, although divided on other aspects of the undocumented worker issued, reached a "significant consensus" that:

> whatever policies are eventually formulated, they should be developed jointly with Mexico. Indeed, it would probably be even more productive and realistic to construct policies multilaterally with those nations which have evidenced significant outmigration tc the United States. Finally, policies should address both the causes and the consequences of migration. Looking only at the impact of clandestine aliens once they are in the United States while failing to deal with the factors that have compelled them to migrate would do little or nothing to alleviate the problem or achieve equitable and effective solutions.[10]

This "consensus" points up the desirability of having working agreements designed to regulate the flow of persons from other countries which are based on policies designed to eliminate some of the causes for people desiring to come to this country. For example, a portion of that part of U.S. foreign economic policy which provides assistance to other countries could and should be targeted to help create jobs and improve living conditions for persons living in other countries who now believe that their only hope is to migrate to the United States. This objective could and should be kept in mind as the United States participates in the formulation and financing of programs sponsored by the United Nations, the World Bank, and the Inter-American Development Bank.

The authors of a very recent study on American immigration have suggested that the formation of a North American Economic Union, whose members would include the United States, Mexico, and Canada, might serve as a vehicle for helping to solve the undocumented worker problem. The relationship between such a union and the immigration problem is described by the authors in the following manner:

> Mexican President Jose Lopez Portillo has said repeatedly that Mexico wishes to export goods, not workers. It is time that the United States realized that it will either import Mexican goods or it will have to accept the importation of Mexican workers.[11]

In brief, this Commission believes that a determination to approach the foreign policy aspect of the undocumented worker problem with a sense of urgency could result in our really getting at some of the "root" causes of the problem. The approaches outlined above can be implemented without jeopardizing our civil liberties.

The Proposed Employer Sanctions Legislation

The undocumented worker issue has over the past few years resulted in proposed legislation designed to penalize employers who hire undocumented workers. Although several States have enacted employer sanctions laws,[12] there is no comprehensive Federal law imposing penalties on employers for hiring undocumented workers.[13]

The most recent Federal proposal for employer sanctions was included in the immigration package presented to Congress by the Carter administration in 1977,[14] recommending that employers who know-

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[10] Latin American Institute of the University of New Mexico, *The Problem of the Undocumented Worker*, pp. 2–3.

[11] Ehrlich, Bilderback, and Erhlich, *The Golden Door*, p. 330.

[12] California and Connecticut are among the States that have enacted employer sanctions laws. The Connecticut statute provides:

> §31-51k. Employment of alien not entitled to residence. (a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States.

Conn. Gen. Stat. Ann. §31-51k (West Supp. 1976). The California statute provides:

> §2805. Alien employment; adverse effect on resident workers; violation. (a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

Cal. Labor Code §2805 (West Supp. 1979).

[13] However, employers who engage in conduct or activity beyond that considered "usual and normal practices incident to employment" may be guilty of "harboring" an alien under §274 of the Immigration and Nationality Act, 8 U.S.C. §1324 (1976). See United States v. Smith, 112 F.2d 83 (2d Cir. 1940) (involving a harboring conviction under 8 U.S.C. §144, the predecessor to 8 U.S.C. §1324).

And farm labor contractors are prohibited from "recruiting, employing, or utilizing, with knowledge," undocumented workers or persons without employment authorization from the Attorney General. 7 U.S.C. §2045 (1976).

[14] Alien Adjustment and Employment Act of 1977 (proposed), S.2252, 95th Cong., 1st Sess., 123 Cong. Rec. S18064 (Oct. 28, 1977). The proposed legislation provides, in pertinent part:

> Sec 5. (a) Section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) is amended—
>
> (1) by inserting after subsection (b) the following new subsection: "(c)(1) It shall be unlawful for any employer to employ aliens in the United States who have not been lawfully admitted to the United States for permanent residence, unless the employment of such aliens is authorized by the Attorney General.
>
> (2) Any employer who violates this subsection shall be subject to a civil penalty of not more than $1,000 for each alien in the employ of the employer on the effective date of this subsection or who has

ingly engage in a pattern or practice of hiring undocumented workers be subject to fines of $1,000 for each alien unlawfully in their employ and to court injunctions ordering them to refrain from such a practice. Violations of the injunction would subject an employer to criminal contempt citations and possible imprisonment. Employers would be able to defend against charges of unlawful employment of undocumented workers by presenting evidence that they examined certain documents which attested to the lawful residency of those employees. Regulations to be issued by the Attorney General after passage of the proposed legislation would describe the documents that an employer could examine to verify the legal status of an employee.

This legislative proposal did not include a recommendation for a national identity card. The analysis which follows is based on the assumption that such a card would not be available. The subsequent section addresses the issues that would be presented if a national identity card were adopted.

The enactment of employer sanctions legislation would constitute unsound public policy for a number of reasons. Under such legislation, employers would be required to make determinations as to whether an applicant had violated the Immigration and Naturalization Act by entering the country without inspection, overstaying his or her visa, or violating the terms of the visa and to refuse to employ any applicant who had so violated the immigration laws. If employers failed to take such action, they would be in violation of the law and subject to civil or criminal penalties.

It is true, of course, that employers are already legitimately subjected by Federal law to many requirements. The Fair Labor Standards Act, for example, compels them to pay their employees a minimum wage and compensate them at a higher rate for overtime work. The income tax laws compel them to withhold a portion of most employees' earnings and to report each employee's total earnings to the government, and Title VII of the Civil Rights Act of 1964 compels them to refrain from unlawful discriminatory employment practices.

An employer sanctions law would be unique, however, in that its purpose would not be merely the regulation of the employer's conduct, but the regulation—by way of the employer—of the prior, nonemployment-related conduct of current or prospective employees. It would compel the employer to assume an enforcement role for the INS, by judging whether an applicant had violated the immigration laws and punishing him or her by denial of employment if he or she was "found guilty." Such an approach would raise troubling questions about the capacity of private employers to undertake law enforcement responsibilities, as well as about the impact that such a system would have on jeopardizing due process rights of applicants.

The effectiveness of an employer sanctions law is also questionable. In testimony before a subcommittee of the House Appropriations Committee, Attorney General Benjamin Civiletti expressed doubts that such a law would accomplish its purpose, and concern that it might prove largely unenforceable, in the following colloquy:

> Mr. Alexander: . . .Would the Attorney General entertain a recommendation to discuss the possibility of imposing criminal sanctions on Americans who knowingly and with their knowledge and consent violate the law by illegally hiring aliens in this country?
>
> Mr. Civiletti: It is easy to say yes, sure, seriously consider it. Attorney General Bell, I think, proposed such a law to the Congress in 1977. At least in the judgment made at that time, it seemed to be of potential assistance in the illegal immigration problem. I am not so sure. I am not so sure that it is not superficial, and that the job of enforcement against American citizens for hiring people, on representations by individuals that they are lawfully here as residents or relatives or have a stay permission or whatever, would be outrageously difficult. Also, it would not be very productive, because unless we can enforce it with a very substantial investigation

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thereafter been employed by the employer, except for such alien whose status was adjusted or application for adjustment was pending pursuant to the terms of section 2 or section 4 of the Alien Adjustment and Employment Act of 1977.

(3) Upon determination that cause exists to believe that an employer has engaged in a pattern or practice of employing aliens in violation of this subsection, the Attorney General shall bring actions for both civil penalty and injunctive relief in the United States district court in any district in which the employer is alleged to have violated this subsection, or in any district in which the employer is found or transacts business.

(4) Proof by an employer with respect to any person employed by him that, prior to the person's employment, or, in the case of a person hired prior to the effective date of this subsection, as soon as practicable but in any event within ninety days of such effective date, he saw such documentary evidence of eligibility to work in the United States as the Attorney General has by regulation designated for that purpose shall give rise to a rebuttable presumption that the employer has not violated this subsection with respect to that particular person. . . .

> and prosecution force, then the economic marketplace will prevail. The needs and ebbs and flows in the marketplace are going to attract [undocumented workers] to the small businessmen, medium businessmen, wives hiring gardeners or maids, the less desirable jobs. Many of the farming migrant worker jobs are going to be filled and we are going to have a substantial area of the law which will be violated and not enforced.
>
> I agree with Congressman [Jack] Hightower [of Texas], there is nothing more debilitating to the fiber of the country and the citizens than having laws on the books which are not obeyed and violations which are not investigated, prosecuted, and enforced. So, I have significant reservations as to an across-the-board employer sanctions law as a single effective tool in this problem.[15]

Of even greater concern, however, is the danger that the passage of employer sanctions laws could lead to discriminatory employment practices involving especially members of the Spanish and Asian heritage communities.[16] In testimony before the Commission, Daniel E. Leach, Vice Chair of the Equal Employment Opportunity Commission, agreed that those fears are well-founded:

> What concerns the Equal Employment Opportunity Commission is that if legislation is enacted with employer sanction provisions as proposed in S.2252 [the Carter administration proposal] in the 95th Congress, employers might act in certain ways which would have the effect of job discrimination on the basis of national origin.
>
> First of all, employers perhaps will want to make prehire inquiries to ensure that they are not hiring undocumented aliens. While Title VII does allow prehire inquiries in some instances, the likelihood is that employers will ask some applicants, those of Hispanic origin, and not others to show proof of citizenship. This disparate treatment of certain groups may be a violation of law.
>
> Secondly, there's a question of whether Americans of Hispanic national origin would be hired at all where employers are unsure the documentation of citizenship presented is a forgery and fear that they might be unknowingly violating the law. Many employers might decide to take no chances and refuse to hire applicants of Hispanic origin. Again, this would constitute national origin discrimination. The agency is also of the opinion that this kind of discrimination would be hard to eradicate.[17]

Members of the business community, who would be the ones penalized for infractions of the law, also believe that discriminatory employment practices would be an inevitable result of employer sanctions. Typical of the concern of employers that discrimination would occur is the congressicnal testimony of Bernard Z. Brown, president of the Coalition of Apparel Industries in California:

> Any statute which prohibits an employer from hiring an undocumented alien, with the necessary sanctions for violation, places a tremendous burden upon the employer. An employer who is concerned with compliance would of necessity view every applicant who fits the physical stereotype of an [undocumented worker] as a potential danger. Thus, in southern California, brown skinned applicants or current employees would be regarded with considerable suspicion. This can hardly be viewed as a healthy situation. In an age that encourages desegregation and acceptance among all races, we are setting the stage for the most blatant form of discrimination.[18]

Smaller businesses would be likely to experience greater enforcement difficulties under an employer sanctions law, as many of those employers are ill-equipped to screen employees for the verification of immigration status. Representatives of the business community in Los Angeles testified that the "average employer" is unable to verify whether immigration documents are bona fide[19] and that small employers do not have the resources to determine legal immigration status "without really treading into the discriminatory questioning."[20] Smaller employers, who already have difficulties in dealing with the complexities of Federal equal employment opportunity law, would most likely be the least equipped to assume employment screening responsibilities without causing increased employment discrimination. According to EEOC Vice Chair Daniel Leach:

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[15] *Hearings Before the Subcommittee on the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies of the House Committee on Appropriations,* 96th Cong., 2d Sess. (1980), p. 59.

[16] This Commission has expressed its concern on previous occasions that Hispanic and Asian American citizens might be subjected to employment discrimination because employers identify them with undocumented workers. U.S., Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974,* vol. VII, *To Preserve, Protect and Defend the Constitution* (June 1977), pp. 41–42.

[17] Daniel Leach, testimony before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 14–15, 1978, pp. 40–41 (hereafter cited as Washington Hearing Transcript).

[18] Bernard Z. Brown, statement, in *The Effects of Proposed Legislation Prohibiting the Employment of Illegal Aliens on Small Business: Hearings Before the Senate Select Committee on Small Business,* 94th Cong., 2d sess. (1976), p. 245.

[19] Richard Lotts, attorney, Los Angeles Chamber of Commerce Task Force Committee, testimony before the California Advisory Committee to the U.S. Commission on Civil Rights, open meeting, Los Angeles, June 15–17, p. 311 (hereafter cited as Los Angeles Open Meeting Transcript).

> the larger employers in the employment area generally—and I speak as an EEOC Commissioner operating under Title VII—larger employers are more sophisticated, have good advice, good counsel; they can afford it as part of their costs. The smaller employer is perhaps where some of the problems in Title VII remain most severe: those that lack sophistication, don't understand the law, choose not to deal with the law. That's a problem for EEOC as it is. I'm sure it would be a problem and continue to be a problem with any legislation that's proposed in this area.[21]

The complexities of the immigration laws make it highly unlikely that the question of legality of an individual's employment could be resolved merely by having the employer examine that person's documentation.[22] To avoid denying employment to some who would be legally eligible to work, employers would have to do more than just examine documents; they would have to develop some expertise in different facets of immigration law.[23] As the Association of Spanish Surnamed Americans, among others, has pointed out, an employer sanctions law:

> wrongfully and unfairly requires the employer to make determinations that can only properly be made by the Immigration and Naturalization Service. In effect, the employer is obliged to act as an immigration officer in determining whether an alien is authorized by the U.S. Attorney General to accept employment.[24]

A former INS employee, with 32 years of service, questioned whether employers could develop the necessary expertise in immigration law to screen employees in order to verify their immigration status correctly.[25]

Although interpreting immigration law to determine whether an employee has lawful status is an extremely difficult task, other employment screening duties could be just as difficult. Even the mere inspection of a bona fide immigration document can create difficulties for an employer. Explaining this problem, Leslie Frank, of the Los Angeles County Bar Association's Joint Committee on Aliens, testified:

> Obviously, there will be a problem where certain employers are just going to be afraid. Today, there are aliens that have employment authorizations stamped on a form I-94, which is an entry-deportation record, and even upon showing this form to an employer, they are afraid, because they are under the impression that they must see a green card. Many employers are surprised when they see it is blue; therefore, thinking a blue-green card, which has been the color since 1965, is a fraudulent document of one type or another, so they panic, and they are afraid and I think justifiably so. Therefore, I think there are many people that are going to be put in a position, if they look differently, if they sound differently, if their primary language is Spanish or Chinese or Thai or whatever, chances of an employer hiring them may be somewhat difficult, and I think through that, that [there] could be many discriminatory practices which on the part of the employers are not at all intentional, and somewhat incumbent upon this type of legislation.[26]

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[20] Frank St. Denis, director of Personnel Services, Hospital Council of Southern California, testimony, Los Angeles Open Meeting Transcript, p. 312.

[21] Leach Testimony, Washington Hearing Transcript, p. 44.

[22] Under an employer sanctions law, employers would need to develop expertise in immigration law in order to verify the immigration status of a job applicant. It would require them to do more than inspect an immigration document to ascertain whether it is bona fide, although testimony indicates that such inspection would also present problems for the employer. Leslie J. Frank, attorney, testimony, Los Angeles Open Meeting Transcript, pp. 237-38. For example, job applicants may be documentable but not deportable in some cases—cases that may take the Immigration and Naturalization Service several weeks to clarify. Russell Parsons, consultant, Merchants and Manufacturers Association, testimony, Los Angeles Open Meeting Transcript, pp. 225-26. Employers could be expected to have similar difficulties in determining the employability of such job applicants.

[23] One example would be the determination of whether a current or prospective employee is a member of the *Silva* class. Such a case was encountered by an employer during INS enforcement activities conducted at the Edinburg Manufacturing Company plant in Edinburg, Texas. That case is discussed later in the "Operation Cooperation" section of this chapter of the report.

[24] Association of Spanish Surnamed Americans, "A Comprehensive Analysis of the Rodino Bill Before Congress" (May 1973), p. 6.

[25] Leslie Wilkinson, testimony before the Texas Advisory Committee to the U.S. Commission on Civil Rights, open meeting, San Antonio, Sept. 12-14, 1978, vol. 5, pp. 68-69 (hereafter cited as Texas Open Meeting Transcript).

[26] Leslie J. Frank, testimony, Los Angeles Open Meeting Transcript, pp. 237-38.

Some insight into the difficulties of interpreting immigration law that would confront employers can be obtained from the California experience in preparing for enforcement of its State employer sanctions law, enacted in 1971.[27] Colleen M. Logan, area administrator for the Division of Labor Standards Enforcement of the California Department of Industrial Relations, testified at the Los Angeles open meeting that employers as well as the State enforcement agency were unsure of the proper method of verifying immigration status. As she put it, "I can't say that they did [understand what to screen for], because I really didn't understand it totally."[28] She further testified that the response of some employers was to screen employees on the basis of "the color of their skin or their. . .speech accent."[29] It was her considered opinion that the employer response to a Federal employer sanctions law would not be any different.[30]

The lack of expertise or understanding of the proper method to verify status might thus lead employers who wished to avoid violating the law to resort to discriminatory employment practices.

Recognizing the discrimination that might result from employers making determinations of citizenship and immigration status, President Carter, in submitting his employer sanctions proposal to Congress, stated: "to prevent any discriminatory hiring, the federal civil rights agencies will be charged with making much greater efforts to ensure that existing anti-discrimination laws are fully enforced."[31] If employer sanctions legislation will result in increased employment discrimination (that is, in the violation of individual civil rights), any remedy provided for the redress of violations does not erase the primary offense. No after-the-fact remedy is ever adequate to compensate for discrimination that prevents some American citizens or legal resident aliens from the full enjoyment of and participation in our democratic society.

Moreover, if an employer sanctions law is enacted, it is highly doubtful for several reasons that more than a small percentage of employment discrimination cases resulting from such a law would be redressed. Persons who would be affected by the proposed employer sanctions law, for the most part, would be citizens and legal residents who are racially and/or culturally identifiable with major undocumented immigrant groups and are applying for jobs which undocumented workers might typically seek. Members of those groups generally are the least informed as to what their rights are and how to seek redress for them. Second, substantial burdens are imposed on the victim of discrimination in pursuing administrative procedures, obtaining legal representation, and proving that employment discrimination occurred. Showing that an employer denied employment to a bona fide job applicant because he or she is racially and/or ethnically identifiable with undocumented workers would often be a very difficult task, even if the applicant persisted in the substantial investment of time and effort necessary to reach adjudication of his or her claim. Finally, Federal civil rights agencies may have difficulties in responding to such employment discrimination cases, for discrimination complaints arising from the proposed employer sanctions law would represent an additional workload on already overburdened agencies.

Even if such cases were handled on a systemic basis rather than an individual case basis, it might not redress a significantly larger number of employment discrimination cases. For example, the EEOC does have authority to institute a pattern or practice lawsuit against an employer who uses a hiring practice that systematically discriminates against otherwise bona fide job applicants.[32] Such suits have the potential of helping many more people than case-by-case resolution of individual complaints . According to EEOC Vice Chair Leach, however, this type of litigation, which normally takes "2, 3 years, or even longer,"[33] may not be directed at those employers who would be most likely to have difficulties with an employer sanctions law:

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[27] Cal. Labor Code §2805 (West Supp. 1979). See n. 7 of this chapter for the relevant text of that statute. The law has not been enforced because of a permanent injunction against its enforcement entered in the still-unresolved case of Dolores Canning v. Milias, No. C-16928 (L.A. Cty., Cal. Super. Ct. filed Nov. 23, 1971). The U.S. Supreme Court held in DeCanas v. Bica, 425 U.S. 351 (1976), that enactment of the Immigration and Nationality Act by Congress did not preclude the State from regulating the employment relationship covered by the State statute in a manner that is consistent with Federal law, but neither the Supreme Court nor the California Court of Appeal reached the question of whether the statute violates the due process or equal protections clauses of the Constitution.

[28] Colleen M. Logan, testimony, Los Angeles Open Meeting Transcript, p. 289.

[29] Ibid., p. 290.

[30] Ibid., p. 291.

[31] President's Message to Congress on Undocumented Aliens, *Weekly Compilation of Presidential Documents*, vol. 13, pp. 1170, 1172 (Aug. 4, 1977).

[32] 42 U.S.C. §2000e-6(e) (1976).

> [T]he bill in the 95th Congress—authorizes so-called "pattern and practice" suits against employers who violate its provisions. Such suits would be difficult to bring, as the employers who would be most affected by the bill are, by and large, small employers.[34]
>
> Our cases—under our new, what we call "systemic program," the way it's conceived is really to achieve the most impact in any case in a matter alleging a pattern or practice. "Impact," I suppose, in one sense means "bigness." So in effect, while hopefully targeting on a worst-first basis, that formula will also include targeting on the basis of where the end product is going to achieve the greatest results. And that really does mean, I suppose, looking at companies that are not classified as small businesses.[35]

National Identity Cards

It has been suggested by some proponents of employer sanctions legislation that the possibility of such a law leading to employment discrimination could be cured by the development and implementation of a compulsory national identification card. A national identity card, they believe, would enable employers to identify with greater certainty persons who are not authorized to accept employment and thus reduce the potential employment discrimination which would result from an employer sanctions law. Some advocates of a compulsory identification system support the alternative of a compulsory national work permit system. The work permit would be required only for job holders and job seekers and would therefore be less costly than a system covering all citizens and resident aliens. Both proposed solutions, however, involve a compulsory identification document and a centralized data bank. Thus, the discussion on the merits of compulsory national identity cards which follows is equally applicable to compulsory work permit systems. There is genuine concern about the efficacy of national identity cards in solving this problem and their cost in terms of the loss of basic civil liberties.[36]

Those in favor of compulsory national identity cards argue that they would be effective because the technology exists for the creation of a tamperproof card. They allege that innovations such as a card which shatters when its plastic casing is removed would help prevent unlawful alterations of such cards. Affixing a photograph and signature, or even a fingerprint, to the card would further add to the difficulty of unlawful alteration and reduce the use of lost or stolen cards by persons other than the lawful holder. By making these technical improvements in the social security card or incorporating these features into the proposed identity card, greater assurance could be given to the card as proof positive of identity. Thus, proponents of national identity cards argue, employer concerns regarding the difficulty of verifying documentation would be answered.

However, the existence of technology to manufacture a more secure identification card would be unlikely to eliminate the black market in false documentation which exists. If the technology for improving the card is available to the government agency administering the compulsory identity card system, then it would likely be available to persons engaged in the unlawful duplication of identity documents. In fact, it could very well be argued that the market for false documentation, whether forged, lost, or stolen, would increase if a compulsory national identity card system is instituted and the possession of such a card is accepted as proof of the right to live and work in the United States. And thus, employers could still be plagued with difficulties in the verification of those new documents.

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[33] Leach Testimony, Washington Hearing Transcript, p. 46. The EEOC further noted:

> Discrimination complaints by their very nature often involve complex considerations (e.g., reviewing personnel tests of uncertain validity, technical degree requirements, and many other areas outside of anti-discrimination law) for which EEOC personnel now obtain the necessary training and expert assistance. It is my opinion that the immigration issue would be less complex than many issues that regularly confront EEOC personnel.

Norton Letter.

[34] Leach Testimony, Washington Hearing Transcript, p. 41.

[35] Ibid., p. 46.

[36] The loss of civil liberties which might result from the development and implementation of a compulsory national identity card or compulsory national work permit system is of great concern to members of minority groups. As the Mexican American Legal Defense Fund stated in a letter to this Commission:

> [W]e strongly oppose any national identity card for purposes of employment or any other purposes. Such a card is in itself a violation of our civil rights and civil liberties. In addition, any such card would as a practical matter be used only on or against Hispanics, Asians, and other national-origin and language minority persons. Whatever the professed requirements of card-carrying, 99% of Anglos would never be asked to produce it.

Morris Baller, attorney, Mexican American Legal Defense Fund, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Apr. 2, 1980.

The Federal Advisory Committee on False Identification,[37] in rejecting in a November 1976 report the proposal for a national identification document, said:

> Ifsuch a system were implemented despite these difficulties, it would be subject to defeat by imposters or counterfeiters taking advantage of careless inspection of documents or through corruption of officials.[38]

Moreover, attempts to make the identity card secure would increase its social and economic costs. As the Department of Health, Education, and Welfare concluded in a study which evaluated the use of the social security card as a standard universal identifier (SUI), "the bureaucratic apparatus needed to assign and administer an SUI would represent another imposition of government control on an already heavily burdened citizenry."[39] The necessity of preparing such a card for every lawful resident of the United States (or even of every lawful resident in the labor force), and of updating the photograph frequently enough for it to be a reliable means of identification, would make the system an expensive and burdensome one. And while affixing a fingerprint to such a card would enhance the reliability of the identity card to a greater degree, it would only be truly effective if the machinery and personnel necessary for verifying fingerprints were maintained by the employer and/or the central data bank of the government agency responsible for administering the compulsory national identity card system. Of course, that would increase even more significantly the cost of the system. A recent study evaluating the expense of establishing a work permit system estimated that such a program, based conservatively on 15 million applications in the first year and 10 million annual additions and deletions in the central data bank files, would entail $28 million "in start-up costs" and $175 million per year "for the first few years."[40]

While agreement is lacking on the efficacy of compulsory national identity cards in curbing the employment of undocumented workers and decreasing unemployment among citizens and resident aliens, the greatest controversy involves the invasion of privacy and the resulting effect this invasion could have on the erosion of other rights, such as the rights to speech, assembly, and association. Proponents of identity cards say that a de facto system already exists and that the invasion of privacy and other rights would be minimal.

Current usage of the social security card and the driver's license lends support to the argument that a de facto system exists. Many businessess request the inspection of either of those documents before finalizing commercial credit transactions or payments made through personal checks. Other entities often ask for those documents as well for proof of identity. In fact, some States, though not all, use the social security account number as the driver's license number. Thus, it is argued that the creation of a national identity card or the conversion of the social security card into such an identifier would be merely the acceptance of current usage and the modern-day demands of society.

It is further argued that the creation of a national identity card or a social security card used as an standard universal identifier would have many beneficial aspects. Among those benefits would be the facilitation of easier and more accurate recordkeeping, the reduction of the duplication of information, and the elimination or reduction of multiple identification numbers. It is argued that there would only be a minimal invasion of privacy and the only information divulged to employers would be the individual card number and the possession of legal residency in this country.[41]

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[37] The Federal Advisory Committee on False Identification was established by the Attorney General of the United States in November of 1974. That committee examined the criminal use of false identification and published a report which contained its findings on the problem and its proposed solution to effectively reduce the growing use of false identification.
The membership of the Federal Advisory Committee on False Identification included: Chairman David J. Muchow, Criminal Divison, Department of Justice (DOJ); Co-Chairman Douglas H. Westbrook, Criminal Division, DOJ; Secretary Emil L. Schroeder, Federal Bureau of Investigation; bureau chiefs, office heads, and other staff of the Departments of Health, Education, and Welfare (now Health and Human Services), State, Treasury, Commerce, Agriculture, Defense, Transportation, and Justice, and representatives of State and local governments, private corporations, professional associations, and trade associations. U.S., Department of Justice, Federal Advisory Committee on False Identification, *The Criminal Use of False Identification* (November 1976), pp. xxxii-xlvii (hereafter cited as *The Criminal Use of False Identification*).

[38] Ibid., p. 75.

[39] U.S., Department of Health, Education, and Welfare (now Health and Human Services), Secretary's Advisory Committee on on Automated Personal Data Systems, *Records, Computers, and the Rights of Citizens* (July 1973), p. 111 (hereafter cited as *HEW Report*). The members of the Secretary's Advisory Committee on Automated Personal Data Systems were: Willis H. Ware, Rand Corporation, chairman; Lyman E. Allen, University of Michigan Law School; Juan A. Anglero, Commonwealth of Puerto Rico Department of Social Services; Stanley J. Aronoff, Ohio State Senator; William T. Bagley, California State Assemblyman; Philip M. Burgess, Ohio State University; Gertrude M. Cox, statistical consultant; K. Patricia Cross, Educational Testing Service; Gerald L. Davey, Medlab Computer Services, Inc.,; J. Taylor DeWeese, Philadelphia; Guy H. Dobbs, Xerox Computer Services; Robert R.J. Gallati, New York State Identification and Intelligence System; Florence R. Gaynor, Martland Hospital; John L. Gentile, Illinois Department of Finance; Frances Grommers, M.D., Harvard School of Public Health; Jane L. Hardaway, Tennessee Department of Personnel; James C. Impara, Florida Department of Education; Patricia J. Lanphere, Oklahoma Department of Institutions, Social and Rehabilitative Services; Arthur R. Miller, Harvard Law School; Don M. Muchmore, California Federal Savings and Loan Association; Jane V. Noreen, St. Paul, Minn.; Roy Siemiller, National Alliance of Bussinessmen; Mrs. Harold Silver, Denver, Colo.; Sheila M. Smythe, Associated Hospital Service of New York; Joseph Weizenbaum, Massachusetts Institute of Technology. Ibid., pp. xii-xiii.

[40] David S. North, "Keeping Undocumented Workers Out of the Workforce: Costs of Alternative Work Permit Systems" (May 1979).

However, the presentation of social security cards or other documents to support credit or other privileges is wholly voluntary and, therefore, is not a reliable index of popular acceptance of a compulsory registration and identification system. Opponents of the use of the social security card as a national identifier further point out that, although it appears to have some de facto acceptance as a universal personal identifier, that was not the purpose for its development. Generally speaking, the social security system was developed to provide retirement income and other governmental assistance to ensure the economic security and personal welfare of American workers. The social security card was devised under that program to establish an account in which payroll tax contributions should be made and later to evidence the eligibility of that employee for participation in social security benefit programs.

The concerns over expanded usage of the social security card led the Congress to enact legislation curbing that abuse.[42] During the Senate floor debates on that provision of the Privacy Act of 1974, Senator Charles H. Percy noted the problems that have been created by the use of the social security card beyond its intended purpose:

> if you look at your own social security card, at the bottom, it reads:
>
> *For social security and tax purposes—not for identification.*
>
> The social security number was clearly not intended by its creators to become the universal identifier. But in the race to computerize every known fact stored by the Government about its citizens, the warning on our cards has been ignored. It is not so much that the social security number had to be used by the computer programmers and data collectors. It was there and it was convenient. Apparently no one gave thought 15 or 20 years ago to the possibility that massive computerization of personal data files on the basis of a single unprotected number could someday pose a problem.
>
> That lack of foresight was unfortunate—for now hundreds of Government computer systems and thousands of private computer systems use the social security number in the indexing and identification of individuals. The possibility is growing that anyone with access to the proper computer terminal could type in a social security number and thereby order the computer to print out details concerning what cars we own, and what our driving record is like, how we spend our money and how we pay our bills, how we did in school, what we tell our doctor and what he tells us in return.[43]

Compulsory national identity cards, whether they evolve from the extension of the use of the social security card or the creation of a new document, also present potentially grave problems, as alluded to by Senator Percy, of the infringement of individual civil liberties and the right to privacy. The establishment of a compulsory nationwide system of identification would mean the imposition of another substantial government program of data collection and information gathering on individual Americans. The concerns over the already significant amount of such data collection by the Federal Government were perhaps most aptly expressed by Professor Arthur Miller of the Harvard Law School:

> Americans today are scrutinized, measured, watched, counted, and interrogated by more government agencies, law enforcement officials, social scientists, and poll takers than at any other time in our history. . . .The information gathering and surveillance activities of the Federal Government have expanded to such an extent that they are becoming a threat to several of every American's basic rights, the rights of privacy, speech, assembly, association, and petition of the Government. . . .
>
> I think if one reads Orwell and Huxley carefully, one realizes that "1984" is a state of mind. In the past, dictatorships always have come with hobnailed boots and tanks and machineguns, but a dictatorship of dossiers, a dictatorship of data banks can be just as repressive, just as chilling

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[41] Proof of eligibility for a social security card currently consists of proof of age, citizenship or alien status, and true identity. 20 C.F.R. §422.107 (1979).

[42] Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, 1909 (codified at 5 U.S.C. §552a note).

[43] 120 Cong. Rec. 36905 (1974) (remarks of Senator Percy).

> and just as debilitating on our constitutional protections.[44]

The problems posed by a universal identification system are not limited, however, to the creation of information files on individual Americans or the types and amount of data collected by the Federal Government. There are also problems with respect to who has access to the data and their use of that information. Although the institution of a compulsory national identity card system raises some serious questions as to the potential access of employers to information which would be contained in an individual's file, the more obvious and greater concern would be the improper use of information collected by the government agency. This would not be a new problem for government data gathering. Congress has recognized this as a serious problem in its deliberations. And in enacting the Privacy Act of 1974, [45] Congress stated that such legislation was necessary due to the

> illegal, unwise, overbroad investigation and record surveillance of law-abiding citizens produced in recent years from actions of some over-zealous investigators, and the curiosity of some government administrators, or the wrongful disclosure and use, in some cases, of personal files held by Federal agencies.[46]

The heightened concern of Americans over governmental intrusions into the right to privacy of individuals is reflected in decisions of the Supreme Court of the United States over the last decade. The Court has recognized that a right to privacy does exist.[47] Although "[t]he Constitution does not explicitly mention any right of privacy," the Court has stated that it flows from the zones of privacy created by many constitutional guarantees.[48] In an earlier era, Justice Louis Brandeis referred to this right as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men"[49] and stated:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[50]

The development and implementation of a compulsory national identity card system would provide law enforcement officers and other governmental officials with a potentially "powerful weapon of intimidation" which could result from "the mere threat of official confiscation."[51] The utility of a standard universal identifier or a compulsory national identity card would be in its presentation upon official request. Creating a compulsory national identity card system or elevating the social security card to the status of a national identifier would make it all the more likely that a variety of governmental officials (not involved in the administration of social security programs or employment programs) would demand inspection of that document and thus provide the potential for violations of individual rights.

These dangers have been noted in several studies. In July 1977 the Privacy Protection Study Commission, established by the Congress, in a report to President Carter, dealt with these fundamental issues in depth. In a chapter on the social security number, it reached this conclusion:

> That the Federal Government not consider taking any action that would foster the development of a standard, universal label for individuals, or a central population register, until such time as significant steps have been taken to implement safeguards and policies regarding permissible uses and disclosures of records about individuals in the spirit of those recommended by the [Privacy Protection Study]

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[44] S. Rep. No. 93-1183, 93d Cong., 2d sess. 7 (1974).

[45] 5 U.S.C. §552a(1976).

[46] S. Rep. No. 93-1183, 93d Cong., 2d sess. 1 (1974).

[47] Carey v. Population Services Intl. 431 U.S. 678, 684 (1977); Roe v. Wade, 410 U.S. 113, 152 (1973); Griswold v. Connecticut, 381 U.S. 479, 484-84 (1965).

[48] As the Court stated in Roe v. Wade, 410 U.S. at 152:

> The Constitution does not explicitly mention any right of privacy. In a line of decision, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Courts or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1,8-9 (1968), Katz v. United States, 389 U.S. 347, 350 (1967), Boyd v. United States, 116 U.S. 616 (1886), see Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484-485; in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[49] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[50] *Id*. at 479.

[51] *HEW Report*, p. 111.

> Commission and those safeguards and policies have been demonstrated to be effective.[52]

In support of this recommendation, the Privacy Protection Study Commission included the following comments:

> [T]here is currently much debate about the need to develop foolproof methods of identification in order to deter fraudulent uses of standard documents widely used for identification and authentication purposes, such as drivers' licenses and Social Security cards. The [Privacy Protection Study] Commission recognizes that such use of identification documents imposes a heavy loss on industry, government, and society as a whole, but also recognizes that the development of improved identity documents is often viewed as inconsistent with America's tradition of civil liberties. . . .
>
> Because of this potential conflict, the [Privacy Protection Study] Commission believes that any consideration of a standard universal label and of a record system approximating a central population register, should be postponed until society, through its legislatures, has made significant progress in establishing policies to regulate the use and disclosure of information about individuals collected by both private organizations and government agencies, and until such policies are shown to be effective.
>
> * * *
>
> Therefore, Recommendation (4), above, means that the Federal Government should act positively to halt the incremental drift toward creation of a standard universal label and central population register until laws and policies regarding the use of records about individuals are developed and shown to be effective.[53]

It is significant that this recommendation is the final recommendation in the Privacy Protection Study Commission's report and in effect gives expression to a central concern of that Commission which a reading of the entire report makes very clear.

This central concern is reflected in the following excerpts from its discussion of the Privacy Act:

> The Privacy Act grew out of nearly a decade of congressional examination of information systems in the Executive branch, and it followed closely on the heels of the record-keeping abuses and invasions of personal privacy associated with the Watergate affair. It was passed partially as a protection against premeditated abuses of Federal agency records but, more importantly, in recognition of the fact that even normal uses of a record about an individual can have harmful consequences for him and that this potential harm can be greatly magnified by the use of emerging computer and telecommunications technology. Despite these antecedents, however, there is little in the Privacy Act to prevent premeditated abuses of power through the misuse of recorded information, particularly where internal agency uses are concerned. Although the individual's position in relation to an agency is much stronger as a result of the Act, the safeguard provisions have not been implemented in a way that adequately deters abuse by agency personnel, especially in view of the lack of internal agency compliance monitoring or auditing.
>
> Moreover, the problems perceived by the Congress at the time of the Act's passage have turned out to be more complex than anticipated, and by and large they are independent of the problem of premeditated abuse. Actual or potential information abuses are much more likely to result from continuing growth in the government's appetite for information about individuals and in the use of that information for growing numbers and types of purposes. *The real danger is the gradual erosion of individual liberties through the automation, integration, and interconnection of many small, separate record-keeping systems, each of which alone may seem innocuous, even benevolent, and wholly justifiable.* Dramatic developments in computer and communications technology, which both facilitate record-keeping functions previously performed manually and provide the impetus and means to devise new ones, can only exacerbate this problem. [emphasis in original][54]

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[52] Privacy Protection Study Commission, *Personal Privacy in an Information Society* (1977), p. 617.

The members of the Privacy Protection Study Commission were: Chairman David F. Linowes, certified public accountant, N.Y.C., and Boeschenstein professor of political economy and public policy, University of Illinois; Vice Chairman Willis H. Ware, Rand Corporation, Santa Monica, Calif.; William O. Bailey, president of Aetna Life & Casualty Company, Hartford, Conn.; William B. Dickinson, retired managing editor, Philadelphia Evening Bulletin; Congressman Barry M. Goldwater, Jr., California; Congressman Edward I. Koch, New York; and State Senator Robert J. Tennessen, Esq., Grose, Von Holtum, Von Holtum, Sieben & Schmidt, Minneapolis, Minn. Ibid., p. ix.

[53] Ibid., p. 618.

[54] Ibid., p. 533.

As previously indicated, the Federal Advisory Committee on False Identification has opposed the development of a national identity card.[55] An HEW study also opposed the use of the social security card as a standard universal identifier.[56] In that HEW study, the Secretary's Advisory Committee on Automated Personal Data Systems noted:

> The national population register that an SUI implies could serve as the skeleton for a national dossier system to maintain information on every citizen [and resident] from cradle to grave.[57]

That study further stated that this type of information gathering is at odds with American traditions:

> A permanent SUI issued at birth could create an incentive for institutions to pool or link their records, thereby making it possible to bring a lifetime of information to bear on any decision about a given individual. American culture is rich in the belief that an individual can pull up stakes and make a fresh start, but a universally identified [person] might become a prisoner of his recorded past.[58]

The great potential for infringement of privacy rights and the impact this could have on the infringement of other rights strongly suggests that the national identity card proposal, if adopted, will merely exchange one problem for a different and more serious problem.

In introducing the bill which eventually became the Privacy Act of 1974, former Senator Sam J. Ervin, Jr., may have offered the most eloquent statement of that concern over further governmental intrusion into individual privacy:

> there must be limits upon what the Government can know about each of its citizens. Each time we give up a bit of information about ourselves to the Government, we give up some of our freedom. For the more the Government or any institution knows about us, the more power it has over us. When the Government knows all of our secrets, we stand naked before official power. Stripped of our privacy, we lose our rights and privileges. The Bill of Rights then becomes just so many words.[59]

"Operation Cooperation"

Although there is growing public debate over the employment of undocumented workers, the issue remains unresolved, as all attempts at enacting a Federal law to prohibit their employment have failed. The uncertain status of such legislation notwithstanding, the INS in some regions of the country has instituted a program to dissuade employers from hiring undocumented workers. This program, known in some areas as "Operation Cooperation" or the "Denver Project," is not specifically authorized by statute or regulation and may subject persons to the same types of employment discrimination as might result from an employer sanctions law.

According to an internal memorandum of the INS Western Region, "Operation Cooperation" is conducted in the following manner.[60] An INS investigator initially contacts the employer and

> seeks his consent to conduct a survey. . . .If the employer agrees to the proposed survey he is then advised that the survey will be conducted in the near future but he is not apprised of the exact date. . . .
>
> If the owner of the business refuses to give consent to conduct a survey, an attempt is then made to apprehend several [undocumented] alien employees and obtain the necessary probable cause to support the issuance of a search warrant by a Federal Magistrate. . . .
>
> Upon completion of the survey [whether conducted with consent or with a search warrant] the employer is then notified by mail as to the names of the [undocumented] aliens who were found in his employ. He is requested to employ only persons who are in the United States legally and is also advised that this Service will assist him in determining if aliens who are seeking employment have a legal right to be in the United States.[61]

The Western Region memorandum raises several issues that challenge the propriety of such a program in the absence of legislation prohibiting the employment of undocumented workers. First, because the Immigration and Nationality Act does not provide for employer sanctions, employers are not required to screen employees to determine their immigration status. Although INS asks employers to screen employees voluntarily, it does not give them any guidelines under this program to ensure that screening techniques are not discriminatory. Secondly, the employer's consent may not be truly voluntary.[62] If an employer refuses to consent, the memorandum suggests that such refusal will be grounds to stake out that business and to attempt to apprehend employees who may be undocumented.[63] Examination of these employees would be expected to provide the necessary information to obtain a warrant to search the establishment.

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[55] *The Criminal Use of False Identification*, p. 76.

[56] *HEW Report*, p. 112.

[57] Ibid., p. 111. Similar concerns were expressed by the Privacy Protection Study Commission on p. 618 of its report.

[58] *HEW Report*, pp. 111-12.

[59] 120 Cong. Rec. 12646 (1974) (remarks of Sen. Ervin).

[60] In April 1980 the INS informed the Commission that:

> The "Operation Cooperation" program has been suspended until July 1, 1980, due to Service policy during the 1980 Census. It is anticipated that the program will resume on July 1, 1980.

David Crosland, Acting Commissioner, Immigration and Naturalization Service, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Apr. 28, 1980.

[61] Philip H. Smith, Assistant District Director for Investigations, Los Angeles INS District Office, memorandum to INS Western Regional Commissioner, Mar. 14, 1977.

The continuation of "Operation Cooperation" could result in employment discrimination.[64] For example, certain preemployment inquiries attempting to verify the immigration status of prospective employees, particularly if they are directed only to selected ethnic or racial groups, may well violate Title VII or State fair employment practice laws.[65] No attempt has been made by INS officials to ensure that "Operation Cooperation" protects job applicants from discrimination based on such unlawful employment practices. At the Los Angeles meeting, Joseph Sureck, then Los Angeles INS District Director, said, "We want. . .[employers]. . .to go to FEPC [Fair Employment Practices Commission] to determine the proper questions to ask."[66] He also said that he was unsure what constituted permissible preemployment inquiry, testifying: ". . .I am not really certain about this; because it is a little confusing to me. . .I cannot speak with absolute certainty."[67] These statements emphasize the absence of INS verification guidelines to safeguard the employment rights of individuals and point out the potential employment discrimination that could result from continued use of "Operation Cooperation" as an enforcement technique.

The voluntary nature of employer cooperation with INS is called into question by the testimony of George Lundquist, manager of the Edinburg Manufacturing Company plant in Pharr, Texas. He testified[68] that he had initially consented to participate in the "Denver Project," as "Operation Cooperation" is known in that area, but that subsequent withdrawal from the program resulted in an INS raid on the plant.

Before participation in the "Denver Project," Mr. Lundquist said, relations between the company and INS had been friendly, and the company had cooperated with INS in the investigation of several employees. On those occasions the INS would call the employee into a private office for interrogation.[69] After those investigations, INS officers returned and asked Mr. Lundquist to cooperate in the questioning of all plant employees, the "Denver Project." Mr. Lundquist testified that he agreed to cooperate because he did not want employees to be late for work or to be delayed in getting home after the working day and because he thought the questioning would not interrupt the smooth operation of the plant. He stated that the INS officers agreed to verify the employees "a little bit at a time."[70] Sixty employees were randomly selected for the first screening.

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[62] On the issue of consent, the INS asserted:

> As to the statement that an employer's consent may not be truly voluntary, in many cases INS is in possession of evidence establishing probable cause to support the issuance of a search warrant at the time voluntary cooperation of the company is solicited, thereby obviating the necessity for such consent.

Leonel Castillo, Commissioner, Immigration and Naturalization Service, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Sept. 28, 1979 (hereafter cited as Castillo Letter).

The Commission does not agree that the possession of evidence allegedly establishing probable cause is sufficient to obviate the necessity for consent unless, as prescribed by the fourth amendment, a neutral and detached magistrate has had an opportunity to weigh that evidence to determine whether probable cause exists and whether a search warrant should be issued. Probable cause is a determination that should be made by an impartial judicial officer, not by an INS law enforcement officer. (For a more detailed discussion of INS area control operations and the fourth amendment, see chapter 6 of this report.)

[63] In commenting on this section of the report, the INS stated:

> It follows, logically, that if a company does not participate in "Operation Cooperation," where appropriate arrangements are made to determine whether undocumented aliens are employed by the company, that routine area control operations may be used to make that determination pursuant to the Service's authority granted by section 287 of the Immigration and Nationality Act, 8 U.S.C. 1357.

Castillo Letter.

The Commission in no way suggests that INS officers do not have authority, without warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States," 8 U.S.C. §1357(a)(1) (1976), or "to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of the immigration laws," 8 U.S.C. §1357(a)(2)(1976). But the Commission is of the view that such actions of the INS should be conducted in accordance with the fourth amendment to the Constitution. (See chapter 6 of this report for a detailed discussion on the application of the fourth amendment to INS area control operations.)

[64] In conducting its immigration study, the Commission did investigate the potential for employment discrimination under the proposed employer sanctions legislation. Witnesses at the Commission hearing and regional open meetings noted the potential discrimination that could result from employer attempts to verify the immigration status of employees under such a law. No investigation, however, was undertaken to substantiate whether employment discrimination has actually occurred under "Operation Cooperation." But because "Operation Cooperation" is similar to the employer sanctions proposal (both involve a program for the verification of the immigration status of employees) and because it does not contain guidelines for the prevention of employment discrimination, the Commission believes that it offers the same potential for employment discrimination that an employer sanctions law would.

[65] Leach Testimony, Washington Hearing Transcript, p. 40; Wilson Testimony, Los Angeles Open Meeting Transcript, p. 275; Garcia Testimony, Los Angeles Open Meeting Transcript, pp. 273-74.

[66] Joseph Sureck, testimony, Los Angeles Open Meeting Transcript, p. 512.

[67] Ibid., p. 513.

[68] George Lundquist, testimony, Texas Open Meeting Transcript, vol. 3, pp. 6-33.

[69] Ibid., p. 7.

Mr. Lundquist said that the first attempt to verify the lawful status of employees, however, was:

> really disruptive. . . .There. . .[were] fantastic anxiety levels. Where things were normally running smoothly at 10 minutes after 7, there was no flow. There was lots of discussing, lots of talking, lots of—just nervousness. It took about 20 minutes, 30 minutes for them to check these 60 people.[71]

Because the four INS officers did not "get to check people as they were coming through the timeclocks," they "went up and down this line checking documentation" after the factory began operation.[72]

During this survey, INS agents brought one employee to the plant office and asked that she be fired.[73] The employee, who had been with the company for "several years" and "had [a] vested interest in our profitsharing, vacation, holiday pay, etc.,"[74] was lawfully entitled to work and remain in the United States under a Federal court order entered in a class action, *Silva* v. *Levi.* [75] She had in her possession a letter from her attorney stating that she was a member of the protected class in *Silva* v. *Levi.* Mr. Lundquist said that the INS officers insisted upon her termination "although it was not illegal for me to employ her and they could not deport her if I was to cooperate and terminate her."[76] At this point he refused to fire the employee and withdrew the participation of the plant in the verification program after his Dallas office informed him that "[w]e don't have the right to give away people's rights."[77] As a result, Mr. Lundquist alleged, the INS officers responded that they would "have to do it the hard way."[78]

Soon after this confrontation, the INS obtained a search warrant (as the Western Region memorandum indicated would be done under "Operation Cooperation" where consent was refused) and conducted a "factory survey"[79] of the plant, arresting 14 of the 938 employees, all of whom were later released from detention at the INS office. None of the 14 employees, although aliens, was deportable.[80]

The voluntary nature of the cooperation was also called into question at the Los Angeles open meeting on immigration. Antonio Rodriguez, of the Immigration and Labor Action Center of Los Angeles and the Los Angeles Center for Law and Justice, testified:

> With respect to the alleged cooperation by most employers, I think that we should on the other hand explain what happens if there is no cooperation and how employers are placed under the gun. If when INS shows up at a factory, demands entry—if the employer refuses to allow them in, agents block all exits while other agents go back and obtain a warrant.
>
> What that means is that, since all exits are blocked, no worker, no one from inside the factory, can go out of that factory, unless at the risk of having his fourth amendment rights violated and at the risk of being arrested; that is, in order to leave the factory, one is going to have to answer questions regarding citizenship, regarding manner of entry, etc. . . .
>
> No one can leave. We have seen cases where as much as 3 to 4 hours were taken in order to get

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[70] Ibid., p. 8.

[71] Ibid., p. 9.

[72] Ibid., pp. 8–9.

[73] In a letter to the Commission, the INS disputed the testimony of plant manager George Lundquist that requests for the termination of an individual's employment are made under "Operation Cooperation." It stated:

> "Operation Cooperation" does not contemplate, and INS does not request, the discharge of anyone employed at a place where an area control operation is carried out. If the alien is deportable, he or she is simply removed to the local INS office or given a specific date to report to such office. No steps are taken to sever the employment of a person other than the removal of the deportable alien.

Castillo Letter.

[74] Lundquist Testimony, Texas Open Meeting Transcript, vol. 3, p. 9.

[75] Silva v. Levi claimants, Western Hemisphere nationals residing in this country before Mar. 11, 1977, and registered for an immigration visa with an American consul prior to Jan. 1, 1977, are lawfully entitled, under a judicial order, to remain in the United States pending the issuance of available recaptured visa numbers that would allow them to adjust their immigration status. The Silva v. Levi case was a class action challenging the policy of charging Cuban refugees who had received adjustment of status under the Cuban Adjustment Act to the annual Western Hemisphere immigration quota. The court held that the policy was contrary to law and denied other Western Hemisphere nationals the opportunity to be considered for the 144,999 visa numbers granted to Cuban refugees and charged to the Western Hemisphere quota. As a result, the court ordered that those 144,999 visa numbers be recaptured and made available to Western Hemisphere nationals residing in the United States so that they could adjust their status. Until those visa numbers are exhausted, Western Hemisphere nationals within the protected class residing in this country are not subject to deportation and have authorization to seek employment. Silva v. Levi, No. 76 C 4268 (N.D. Ill. Apr. 1, 1978), entered final order *sub nom.* Silva v. Bell, No. 76 C 4268 (N.D. Ill. Oct. 10, 1978).

[76] Lundquist Testimony, Texas Open Meeting Transcript, vol. 3, p. 10.

[77] Ibid.

[78] Ibid., pp. 14–15.

[79] Factory surveys are one type of area control operation conducted by INS officers. The legality of such enforcement techniques is discussed in chapter 6 of this report.

[80] Lundquist Testimony, Texas Open Meeting Transcript, vol. 3, pp. 11, 20–21.

> a warrant, and during that time, no one from the factory was able to leave.[81]

The final step in "Operation Cooperation" procedures, as disclosed in the INS memorandum, is the notification of employers by mail "as to the names of the [undocumented] aliens who were found in his employ."[82] These letters potentially could be used to establish the necessary "pattern or practice" for prosecuting employers for violations of an employer sanctions law that might later be enacted by Congress. As stated in the memorandum:

> The purpose of notifying employers of the identity of these [undocumented] aliens is that in the event of the enactment of a law imposing sanctions against employers of [undocumented] aliens, this office will have evidence of such employment practices on the part of a large number of employers in this area.[83]

This point was reiterated by the INS Western Regional Counsel, who testified at the Los Angeles open meeting that: "If sanctions such as these letters [Operation Cooperation] were ever enacted into law, then this would be the first bite that the employer would get without getting the possibility of any proceedings against him."[84]

Summary

The foregoing discussion points up the fact that the flow of illegal migrants has resulted in proposals being advanced that are designed to reduce the flow but that, in the judgment of the Commission, raise serious questions about the undermining of civil liberties. The Commission does not believe that, serious as the adverse impact of the undocumented workers may be on the employment opportunities of some citizens and legal aliens, the Nation is warranted in traveling a path which could result in depriving all citizens of civil liberties. The Commission does not believe that the ends that would be achieved justify the proposed means.

This does not mean that the Commission believes that the Nation should settle for the status quo. As indicated earlier, the Commission believes that action can and should be taken on both domestic and foreign policy fronts designed to reduce the number of undocumented workers who are in jobs that would otherwise be occupied by citizens or legal resident aliens.

Findings and Recommendations

Summary Finding: Although the exact nature and degree of the impact of undocumented workers on the American economy is unknown, most immigration experts agree that it is an issue of serious national concern and that there is an adverse impact on domestic unemployment for some of our citizens and legal residents. They are, however, divided on the manner in which to address the issue. Sharp divisions occur over the need for and/or efficacy of employer sanctions legislation as a unilateral solution to the undocumented worker issue. There is greater agreement on the negotiation of bilateral agreements between the United States and the major source countries to reduce the number of undocumented workers entering this country and to address and help remedy some of the economic conditions and factors that encourage the migration of citizens from the source countries to the United States in search of employment opportunities as a more equitable and effective solution.

Finding 5.1: The extent to which undocumented workers displace citizens and resident aliens from jobs will be increased if some employers are free to exploit them, for example, by paying them less than the minimum wage, because undocumented workers are afraid to assert their rights.

Recommendation 5.1: The Department of Labor should vigorously enforce the Fair Labor Standards Act and other labor laws to ensure that neither citizens nor aliens are required to work under unfair working conditions and to minimize job displacement.

Finding 5.2: The number of undocumented workers can be reduced by more effective immigration law enforcement, through the hiring of additional personnel and through the use of more modern law enforcement technology, such as computerized arrival-departure records. The Commission believes that such an improved law enforcement effort can be accomplished without the dilution of individual civil rights.

Recommendation 5.2: The Congress should appropriate additional funds to the Department of Justice in order that the Immigration and Naturalization Service can more effectively enforce the immigration laws by expanding its work force and having available more modern law enforcement technology.

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[81] Antonio Rodriguez, testimony, Los Angeles Open Meeting Transcript, pp. 343–44.

[82] Philip H. Smith, Assistant District Director for Investigations, Los Angeles INS District Office, memorandum to INS Western Regional Commissioner, Mar. 14, 1977, p. 2.

[83] Ibid.

[84] Bernard Karmiol, testimony, Los Angeles Open Meeting Transcript, p. 567.

Finding 5.3: There are precedents for the development of working agreements to deal with the population flow between the United States and the major source countries for undocumented workers. It is recognized that the negotiation of such agreements must be linked with other outstanding issues between the United States and the source countries, the resolution of which would be to the advantage of all parties. Also, programs of economic cooperation and development can be worked out in such a way that they further develop the resources required to reduce the need for citizens in source countries to seek work in the United States.

Recommendation 5.3: The President should seek bilateral or multilateral agreements or compacts with the major source countries for undocumented workers in order to reduce and regulate the population flow between those countries and the United States.

Finding 5.4: An employer sanctions law would be an unjustifiable imposition of law enforcement duties upon private persons and corporations, with undesirable consequences not only for the employer but for the due process rights of job applicants. Moreover, increased employment discrimination against United States citizens and legal residents who are racially and culturally identifiable with major immigrant groups could be the unintended result of an employer sanctions law.

If sanctions against the employment of undocumented workers are enacted, unintentional employment discrimination against current or prospective employees by employers, even when they act in good faith, may not be preventable. Bona fide job applicants who are "foreign looking" or "foreign speaking" may be denied employment because employers are unable to make determinations of lawful immigration status. The inability to screen employees properly may result from inadequate employer resources for verification of status, insufficient verification guidelines, or the inability or unwillingness of employers to interpret or evaluate an individual's immigration status.

Increased enforcement efforts by Federal civil rights agencies have been proposed as a remedy for potential employment discrimination resulting from an employer sanctions law. However, the time, effort, sophistication, and expense typically required of a complainant to pursue an employment discrimination case to a successful conclusion are such that very few cases of discrimination would be redressed. Moreover, after-the-fact remedies are rarely adequate to compensate American citizens and legal residents for the discrimination that prevents them from the full emjoyment of and participation in our democratic society.

Recommendation 5.4:† Congress should not enact an employer sanctions law.

Finding 5.5: The development and implementation of a compulsory national identity card system or a compulsory national work permit system has been proposed as a tool to deal with some of the problems involved in implementing an employer sanctions law.

Studies by government commissions raise serious doubts relative to the possibility of developing a secure, tamperproof national identity card or work permit which would eliminate the market for false documentation, whether forged, lost, or stolen.

An even more fundamental objection, however, is that the availability of such a national identity card would provide a tool that could be used to violate the right to privacy of the individual.

Recommendation 5.5:‡ Congress should *not* enact legislation for the development and implementation of a compulsory national identity card or work permit system.

Finding 5.6: INS currently conducts a program to verify the immigration status of employees which does not have adequate guidelines to protect current or prospective employees from employment discrimination.

Despite the unresolved national debate over employer sanctions, the INS has instituted a program, known in some areas as "Operation Cooperation" or the "Denver Project," to dissuade employers from hiring undocumented workers. Participation in this program is not always voluntary. Failure to cooperate in this program can subject a business establishment to a disruptive INS raid or area control operation, which in turn may subject employees to violations of their constitutional rights (for example, see chapter 6 of this report for a discussion of fourth amendment problems in INS area control operations).

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† Commissioners Stephen Horn and Frankie M. Freeman have dissented from this recommendation. For their comments, see "Additional Statement by Vice Chairman Stephen Horn" and "Separate Statement of Commissioner Frankie M. Freeman."

‡ Commissioners Stephen Horn and Frankie M. Freeman have dissented from this recommendation. For their comments, "Additional Statement by Vice Chairman Stephen Horn" and "Separate Statement of Commissioner Frankie M. Freeman."

More important, "Operation Cooperation" contains no safeguards to protect employees from unfair employment practices which have been or will be adopted by employers under the program. This leaves the program open to the same types of employment discrimination that might result from an employer sanctions law.

Recommendation 5.6:• INS should terminate use of programs such as "Operation Cooperation."

• Commissioners Stephen Horn and Frankie M. Freeman have dissented from this recommendation. For their comments, see "Additional Statement by Vice Chairman Stephen Horn" and "Separate Statement of Commissioner Frankie M. Freeman."

THE EXPULSION PROCESS

Chapter 6

Apprehensions by the Immigration and Naturalization Service

> *We are confronted here with the all-too-familiar necessity of reconciling a legitimate need of government with constitutionally protected rights. There can be no question as to the seriousness and legitimacy of the law enforcement problem with respect to enforcing along thousands of miles of open border valid immigration and related laws. Nor can there be any question as to the necessity, in our free society, of safeguarding persons against searches and seizures proscribed by the Fourth Amendment.* [1]

On a Thursday evening in March 1978 in Washington, D.C., at Blackie's House of Beef, a busy downtown restaurant, "[a] few minutes after 6 o'clock, five cars stop at the curb on 22nd Street in front of Blackie's. Out step a dozen agents of the Immigration and Naturalization Service (INS), a division of the Justice Department. Two agents run into the alley and take up positions blocking the service entrance. Another hurries to cover a side exit.

"The main party of agents walks through the front entrance, politely pushing through the line of waiting customers. The maitre d' steps forward. "Reservations, gentlemen?" he asks. The lead agent. . .flashes a piece of paper. Immigration service, we have a warrant, we're coming in. He nods at the other agents, and they go toward the kitchen area. The maitre d' looks as if he wants to protest, then thinks better of it and stands aside. . . .For some two hours the agents range throughout the restaurant, demanding identification papers from anyone who looks Hispanic or African. . . .Work in the kitchen comes to a standstill, and patrons' grumbling in the dining room becomes a muted roar. . . .

"Finally, the agents pick out fifteen persons, put them in unmarked cars, and take them down to immigration headquarters for further questioning. . . ."[2]

A few months later, a United States district court judge rules the actions of the INS to be unlawful.[3]

Apprehension activity such as this,[4] termed "area control operations," along with some other variations, inspires some of the most serious complaints against the Immigration and Naturalization Service. These complaints are not without a substantial basis in fact, since many of the area control operations are conducted based on anonymous and vague tips that "illegals" are present in a given area. The INS does not have, as a rule, sufficiently detailed or reliable information to obtain arrest warrants for any specific individuals in these situations. To the contrary, INS apparently prefers an open-ended search because, in addition to the arrest of any individuals about whom specific information is available, INS can use an arrest proceeding against a single individual as an opportunity to interrogate large numbers of people in an attempt to ferret out others who may be undocumented.

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[1] Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

[2] *Washingtonian*, September 1978, p. 169.

[3] Blackie's House of Beef, Inc. v. Castillo, 467 F. Supp. 170 (D.D.C. 1978). The court held that the INS conducted an unlawful and unreasonable search which violated the fourth amendment to the Constitution and which was not authorized by the Immigration and Nationality Act.

[4] Another example of INS apprehension activities occurred in a clothing factory in Texas, where INS agents were refused permission to question employees by the plant manager because a previous interrogation of employees proved too disruptive. INS agents returned days later with a search warrant, sealed off the exits of the plant with armed Border Patrol agents, and interrogated employees at random, even subjecting one employee to a strip search during the raid, or "factory survey," as INS terms it. George Lundquist, plant manager, Edinburg Manufacturing Company, testimony before the Texas Advisory Committee to the U.S. Commission on Civil Rights, open meeting, San Antonio, Sept. 12-14, 1978, vol. 3, pp. 7-33 (hereafter cited as Texas Open Meeting Transcript).

Although such techniques undeniably provide the Service with an opportunity to question large numbers of people and may, in fact, increase the number of aliens apprehended by INS,[5] they can also intrude on the privacy of many United States citizens and permanent residents who are often detained and interrogated during the course of these INS operations.

The scope of INS authority to question persons about their immigration status is spelled out by the Immigration and Nationality Act. Because the general authority given to INS to interrogate individuals forms the legal basis for its other enforcement procedures, including the large-scale interrogations of many persons at places of employment or other public places, it is necessary to explore the breadth of that authority.

Authority

Section 287 of the Immigration and Nationality Act gives agents broad powers to stop and interrogate persons regarding their alienage. Without having to obtain a warrant, INS officers may "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."[6]

In the border areas, INS agents are given even broader powers[7] to search for aliens. However, away from the border the language of this section of the Immigration Act has served as the basis for many INS enforcement activities. This language, while itself imposing no conditions on INS agents exercising their authority to stop and question, must be read in light of the Constitution, as must all legislation enacted by Congress. The limitations imposed on law enforcement officers by the fourth amendment, therefore, have been held to limit the apparent scope of authority conferred on INS officers by the Immigration and Nationality Act.[8]

The fourth amendment,[9] which guarantees the right of the people to be free from "unreasonable searches and seizures," prescribes conditions under which governmental intrusions are permissible. The extent of any conflict between the fourth amendment strictures and the enforcement practices of the Immigration and Naturalization Service is currently a topic of debate, requiring careful examination.

In a series of cases, the Supreme Court has considered the interplay of section 287(a) of the Immigration and Nationality Act and the fourth amendment. From these cases, rulings have emerged permitting wide latitude to INS in the interrogation of persons at the border and at points considered the "functional equivalent"[10] of the border. The Supreme Court has not permitted similar freedom to the INS in "nonborder" situations, however, ruling that vehicles could be stopped by a roving patrol for the purpose of interrogating the occupants only where an officer has a reasonable suspicion based on "specific articulable facts" and reasonable inferences drawn from those facts that the vehicle contains persons who are *unlawfully present* in the United States.[11]

The cases considered by the Supreme Court involved stopping vehicles. The Supreme Court has not yet decided the question of whether an INS agent similarly needs a "reasonable suspicion" of unlawful presence in this country before having the right to stop and interrogate persons on the streets, in places of employment, in transportation facilities (i.e., railroad stations, bus terminals, etc.), and in other public places in nonborder areas, or whether a reasonable suspicion of alienage is sufficient.[12]

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[5] Factory raids and other area control operations, however, do not always uncover deportable undocumented aliens. For example, during a raid of the Edinburg Manufacturing Company in Texas in May 1977, INS agents interrogated a large number of the plant's 938 employees and arrested 14 (less than 2 percent of the total number detained), none of whom was ultimately deported. Ibid.

[6] Immigration and Nationality Act of 1952, 8 U.S.C. §1357(a)(1) (1976).

[7] 8 U.S.C. §1357(a)(3) (1976) grants INS agents authority:

> [W]ithin a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States.

[8] Almeida-Sanchez v. U.S., 413 U.S. 266 (1973).

[9] The fourth amendment of the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

[10] The functional equivalent of the border is exemplified in the following excerpt from a Supreme Court decision where the Court stated:

> For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.

Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973) (footnote omitted).

[11] U.S. v. Brignoni-Ponce, 422 U.S. 873, 874 (1975).

Lower Federal courts, however, have been asked to consider the question, and, in grappling for an answer, have focused on the degree to which an individual is restrained when interrogated by an INS officer.[13] Where a person is considered "seized" or "forcibly detained by an enforcement officer," the fourth amendment prohibition against unreasonable seizures applies. In *Terry* v. *Ohio,* [14] the leading case on investigative stops by law enforcement officers, the Supreme Court held that a street stop which results in an individual's loss of freedom to walk away is a "seizure" for constitutional purposes. Before he or she can properly make an investigative stop, a police officer is required by *Terry* to have "specific articulable facts" that give rise to a "reasonable suspicion" regarding the commission of a crime and the suspect's connection to that crime.

In its recent holding in *Dunaway* v. *New York,* [15] the Supreme Court reiterated its decision in *Terry.* It found that the accused was seized unconstitutionally where there was no probable cause to believe he had committed a crime, and where he was taken into custody by a law enforcement officer and would have been physically restrained had he tried to escape. The Court stated that, although certain narrow exceptions to the requirement that an officer have probable cause before seizing a person do exist, including INS authority to make border vehicular stops and to erect fixed checkpoints in the border area, these exceptions are to be interpreted narrowly.[16]

Where a person is interrogated by an INS officer, the courts have recognized that a forcible detention can occur not only by force or threat of force, but also by a "command based on the agent's official authority."[17] The courts have also interpreted *Terry* to require that, in order for a "seizure" to occur, not only must a person be restrained to the extent that he or she is not free to leave, but this individual must also be aware that his or her liberty has been restrained:

> There must be a knowledge of the situation on behalf of both the police and the suspect. There can be no seizure where the subject is unaware that he is "seized."[18]

The major issue currently being debated by the courts is the point at which the mere questioning of a person by an INS officer becomes a forcible detention or "seizure" of that individual. The courts generally agree that an INS officer must have a reasonable suspicion, based on specific articulable facts, that an alien is *unlawfully* present in the United States before he or she can detain that person for interrogation.[19] On the other hand, an officer may casually question a cooperative person where he or she has a reasonable belief that the person is an alien.[20]

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[12] In fact, the Court expressly reserved, for future decision, the question of whether INS officers may stop persons on a suspicion of alienage alone where there is no reason to believe that they are unlawfully present in the United States. *Id.* at 884 n. 9.

[13] In the line of cases considered by the Supreme Court, there was no question that official restraint was present, since the mere stopping of a moving automobile constituted a governmental seizure of the automobile, thereby involving the fourth amendment.

[14] 392 U.S. 1, 20–22 (1968).

[15] 442 U.S. 200 (1979). In that case, petitioner Dunaway was picked up at a neighbor's home by three police detectives and taken to police headquarters for custodial interrogation despite the insufficiency of information to support a warrant for his arrest.

[16] *Id.* at 210–212. The Court cited U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975), and U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976), as exceptions, within the special context of INS authority to search in border areas, to the general fourth amendment requirement of probable cause before any search or seizure.

[17] Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977).

[18] *Id.* See also Marquez v. Kiley, 436 F. Supp. 100 (S.D.N.Y. 1977).

[19] Yam Song Kwai v. INS, 411 F.2d 683, 686 (D.C. Cir. 1968). See also Au Yi Lau v. INS, 445 F.2d 217 (D.C Cir. 1971).

[20] Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977); Cheung Tin Wong v. INS, 468 F.2d 1123 (D.C. Cir. 1972); Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir.) *cert. denied,* 404 U.S. 864 (1971). In *Au Yi Lau,* the court found that a temporary detention was more intrusive than a mere questioning and therefore was permissible only where the official had a reasonable suspicion that an individual was illegally in the country.

In *Pilliod,* the United States Court of Appeals for the Seventh Circuit affirmed a district court ruling, citing *Brignoni-Ponce,* that a street stop involving questioning against one's will by an INS officer is justifiable only when the officer has a "reasonable suspicion" based on specific articulable facts that the individual is an alien unlawfully in the United States, and not merely that the individual is an alien. The Government had contended that 8 U.S.C. §1357(a)(1) empowered INS agents to "ask questions, and under threat of detention, compel answers." The court rejected this argument, stating:

> As the government concedes, this detention limits the individual's right to walk away. In accord with the Court of Appeals for the District of Columbia, we hold that when an individual is detained against his will for questioning, the INS agents must have a reasonable suspicion that he is an [undocumented] alien.

540 F.2d 1062, 1070, n. 10.

While the court of appeals did affirm the lower court's ruling in the case, it noted that its decision was based on the D.C. Circuit's distinction between casual questions and detention. *Id.*

A rehearing *en banc* clarified the court of appeals' position and resulted in a modification of the lower court's decision enjoining INS from "arresting, detaining, stopping, and interrogating or otherwise interfering with" persons where INS had no warrant, probable cause, or reasonable suspicion of unlawful presence in the United States. The court directed that the injunction be modified so as not to prohibit an agent from questioning a person concerning his or her right to be in the United States if the agent reasonably believed the person to be an alien, provided the agent did not detain that person by "force, threat of force, or a command based on the agent's official authority." The effect of this modification is the adoption of the distinction made by the District of Columbia Court of Appeals in *Au Yi*

The courts have held that a person's cooperation or willingness to be questioned is a crucial element in determining whether he or she has actually been detained or merely questioned.[21] The rationale underlying this distinction is that the casual questioning of a cooperative person is a minimal invasion of that person's privacy and is justified by the legitimate law enforcement needs of the government to conduct such questioning, while detention is a more substantial invasion of an individual's privacy and can be justified only where the officer has a reasonable suspicion that the individual has violated the law.

The courts generally agree that "so long as the queried person voluntarily submits to questioning, it is lawful for an INS officer to approach on reasonable suspicion of *alienage alone* " (emphasis added).[22] However, at least one court has found that the distinction between casual inquiries and actual detentions is merely theoretical.[23] Recognizing that its duty is to maintain a proper balance between the public interest in apprehending persons unlawfully in the United States and an individual's right to be free of unconstitutional seizures, that court observed that to permit the casual interrogation of suspected aliens was supportable "to the extent that the distinction between casual inquiries and detentive stops is, or can be, strictly observed."[24] In the court's view, however, this distinction was only theoretical and could not possibly be observed in actual situations:

> It is in the nature of [a contradiction in terms] to speak of "casual" inquiry between a government official, armed with a badge and a gun and charged with enforcing the nation's immigration laws, and a person suspected of alienage.[25]

The court stated that the Government's position relying on the distinction between mere questioning and detention was "too weak a reed to lean on" and concluded that, at least with regard to area control operations, a suspicion of *unlawful presence* is necessary to justify any stop, no matter how brief.[26] The court found that this stricter standard reflected the "appropriate balance" between the conflicting considerations.

There is no question that INS statutory authority to interrogate persons is subject to constitutional limitations. The debate has been, and seems likely to remain, over the extent of the actual limits imposed on INS authority to interrogate individuals in nonborder settings where no vehicular stops are involved.[27]

Area Control Operations

The immigration raid detailed at the beginning of the chapter is an example of what the INS terms "area control operations" or "surveys." The Service cites section 287 of the Immigration and Nationality Act as authorizing its area control operations in neighborhoods, factories, and plants.[28] Whatever label is applied, an area control operation is basically a search for undocumented workers by a large number of INS agents. Typically, entrances and exits to the place to be searched are blocked, and persons within the surrounded area are interrogated regarding their legal status in this country.

Charles Sava, INS Associate Commissioner for Enforcement, stated that area control operations are searches made without specific prior clues as to the presence of particular persons in particular places:

> In other words, an "area control operation" would be looking for, let's say, undocumented workers in an area, or seeking them in a place of employment. While we might have some infor-

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Lau and *Cheung Tin Wong* between the "mere questioning" of a cooperative individual and a "temporary detention" of that individual by an exercise of authority.

[21] Cheung Tin Wong v. INS, 468 F.2d 1123 (D.C. Cir. 1972). Based on the particular facts in this case, which involved the questioning of a Chinese male who appeared to be a busboy and who had just entered a taxi, the court agreed that the immigration agent had adequate grounds for a reasonable belief that the individual was an alien. The court also accepted the Government's contention that the questioning had not involved a "forcible detention," and therefore the agent was not required to have a "reasonable suspicion" of *unlawful presence* in the United States.

[22] Marquez v. Kiley, 436 F. Supp. 100, 112 (S.D. N.Y. 1977) (construing Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976). Accord, Au Yi Lau v. INS, 445 F.2d 217, 222 (D.C. Cir. 1971); Yam Song Kwai v. INS, 411 F.2d 683, 686-88 (D.C. Cir. 1968). *See also* Terry v. Ohio, 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring) (involving investigative stops of person by local law enforcement officers).

[23] Marquez v. Kiley, 436 F. Supp. 100, 112 (S.D.N.Y. 1977). *See also* Illinois Migrant Council v. Pilliod, 398 F. Supp. 882 (N.D.Ill. 1975).

[24] Marquez v. Kiley, 436 F. Supp. 100, 112 (S.D.N.Y. 1977).

[25] *Id.* at 113.

[26] *Id.* at 114. The court stated that:

> When it is further considered that refusal to cooperate or an attempt to evade such a "casual encounter," indeed, even the appearance of nervousness, may well be held to provide reasonable grounds to suspect unlawful presence and therefore to authorize forcible detention. . . the rule urged upon us by the government appears unworkable. [citations omitted]

[27] A recent case, Shan Gan Lee v. INS, 590 F.2d 497 (3d Cir. 1979), considered the two standards and decided the case without endorsing either one, upholding an interrogation as being "reasonably related in scope" to the agent's suspicion.

[28] Bernard Karmiol, INS Western Regional Counsel, testimony before the California Advisory Committee to the U.S. Commission on Civil Rights, open meeting, Los Angeles, June 15-16, 1978, pp. 538-39 (hereafter cited as Los Angeles Open Meeting Transcript).

> mation they were there, it's different from having a case where we are going to interview a particular person by name at a given location. . . .[29]

INS area control operations must be evaluated against the judicial restrictions imposed by court cases on INS interrogation authority. This section discusses current INS area control operations in view of the judicial standards applicable to interrogations of individuals. Specifically, it examines area control operations to determine whether INS enforcement practices violate the fourth amendment guarantee of freedom from unreasonable seizures, whether or not INS relies on specific articulable facts to launch these operations and whether search warrants currently used by INS to conduct area control operations are constitutionally permissible. A section also notes the effects of these operations on U.S. citizens and residents as well as aliens.

Area Control Operations as Unreasonable Seizures

The courts have held that a seizure under the fourth amendment occurs when an individual who has been stopped for interrogation loses his or her freedom to walk away and is aware that his or her liberty has been restrained. During factory surveys, INS officers enclose the area or building to be searched and ensure that "the door—the exits are sealed off."[30] Agents will block off exits from surveyed factories to ensure that no employees leave the building:

> Before the limited number of officers available to conduct a survey arrive, diagrams have been prepared indicating the various accesses to the company. Officers are usually stationed at various entrances and exits in order to guarantee that individuals will not escape. Under normal circumstances about 25 percent of those officers available to conduct the survey are stationed outside of the plant.[31]

INS factory raids, then, are carefully planned to ensure that all employees are forced to remain on the premises or are restrained from leaving. Other testimony indicated that factory employees are indeed aware that their freedom to leave has been restricted. One witness testified that during INS factory raids, employees become frightened and in panic attempt to escape:

> I would also like to point out that the raids made of places of work, small factories, are a traumatic experience, and they are frequent, very frequent. The buses pull up and the agents surround the building and enter, and there is absolute pandemonium in the factory. People are screaming, running.[32]

Although individuals can refuse to answer questions when stopped and interrogated by INS officers and can even walk away, an INS official conceded that this could be difficult because INS officers block all the exits:

> Well, he may not be able to get out if the exits are blocked, but he can still refuse to answer, and actually, if he were smart, or if he had been coached properly by some organization, he would insist on his civil rights that he doesn't have to. . .answer. He can just turn away.[33]

Testimony received by the Commission alleged, however, that employees who are trapped in factories in actuality have no choice but to respond to INS interrogation. Mark Rosenbaum of the American Civil Liberties Union testified that during factory raids workers have no real option to walk away from questioning:

> Once inside, INS blocks all exits. There is no way that a person is free to leave the workplace once INS enters, so you have a classic custodial situation in which freedom and liberty [are] removed from all persons, and the message is extremely clear to those who are involved, that they must comply with the questioning, they must answer the questions, and they must answer them generally in the way that INS wants. There is no freedom to refuse. . . .It is a clear *custodial situation* in which there is no

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[29] Charles Sava, testimony before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 14–15, 1978, p. 87 (hereafter cited as Washington Hearing Transcript). On the other hand, Armand Salturelli, INS Southern Regional Commissioner, noted that there are limits on INS authority to conduct area control operations and testified that "we have no authority" to block off city streets for area control operations. Armand Salturelli, testimony, Texas Open Meeting Transcript, vol. 4, pp. 356–58.

[30] Glen Bertness, INS Assistant Commissioner for Investigations, testimony, Washington Hearing Transcript, p. 101.

[31] Philip Smith, INS Assistant District Director for Investigations in Los Angeles, affidavit executed June 30, 1978, filed in ILGWU v. Sureck, No. CV 78-0740-LEW (PX) (C.D. Cal. Feb. 7, 1980) (judgment and order entered) (hereafter cited as Smith Affidavit).

[32] Rev. Bryan Karvelis, testimony before the New York State Advisory Committee to the U.S. Commission on Civil Rights, open meeting, New York City, Feb. 16–17, 1978, vol. 1, p. 120 (hereafter cited as New York Open Meeting Transcript).

[33] Karmiol Testimony, Los Angeles Open Meeting Transcript, p. 566.

> liberty not to respond to the questions [emphasis added].[34]

The fourth amendment guarantees that individuals shall be free of "unreasonable" seizures by government agents. INS officials acknowledge that, under the Supreme Court decision in *Brignoni-Ponce,* INS officers must at least have a "reasonable suspicion" of alienage based upon "specific articulable facts" prior to interrogation of an individual where no vehicle stop is involved.[35] However, there appears to be no uniform INS policy for the selection of interrogatees during its area control operations.[36]

Testimony indicated that in at least one INS region a conflict existed between high-level INS officials as to what interrogation selection method would be legally permissible. INS Western Regional Counsel Bernard Karmiol testified that the legal standards required to interrogate a person as to alienage were set out in the Supreme Court case of *Brignoni-Ponce,* which he interpreted to mean that:

> [M]erely because a person had a brown skin or seemed to be of Latin ethnic derivation, this would not be sufficient to stop this person and speak to him, that other so-called articulable facts [are required].[37]

He concluded that INS officers must also have a reasonable suspicion of alienage based on specific *articulable facts* to question employees during factory raids in metropolitan areas:

> The officer would have to be able to explain at a later time just exactly why, besides the fact that the man had a brown skin, perhaps, he questioned the individual as to his being a citizen or an alien, and then pursued the matter from the point on.[38]

On the other hand, Joseph Sureck, then Los Angeles District Director, testified that after INS officers enter a factory they can interrogate all persons as to their alienage.[39]

Testimony indicated that INS officers in some jurisdictions interrogate all persons in the area targeted for control; others select some persons for interrogation based on ethnicity alone; and still others make selections based on a combination of factors. During an area control operation conducted at Terminal Island in California, INS agents searched every cannery and interrogated all 5,000 employees.[40]

During factory surveys, according to Philip Smith, Assistant District Director for Investigations, INS agents interrogate almost every employee:

> I have the authority to establish policy and set guidelines with respect to investigative procedures and to also implement Immigration policies and policies established by the District Director. . . .Immigration officers during the survey usually speak to *virtually all* persons employed by a company, to either ascertain a person's immigration status or to seek information from that person [emphasis added].[41]

That the policy and practice is to question *all* individuals is made clear by the statement of an INS criminal investigator that she questioned "as many persons as possible, either to determine if they are themselves aliens or to obtain information about other persons. . . ."[42] This practice of interrogating all employees suggests the absence of a reasonable suspicion based on specific articulable facts that each interrogatee is an alien. As previously stated, the courts have found that interrogations conducted in the absence of a reasonable suspicion based on specific articulable facts violate the fourth amendment guarantee of freedom from unreasonable searches and seizures.

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[34] Mark Rosenbaum, testimony, Los Angeles Open Meeting Transcript, p. 336.

[35] As previously discussed, while the *Brignoni-Ponce* Court held that a suspicion of illegal presence was necessary where a vehicular stop in a border area is involved, the Court expressly declined to enunciate a rule applicable to other stops. Although no Supreme Court case has settled the question of the standard to be applied in nonvehicle stop cases, at least one Federal court has ruled that a suspicion of *illegal presence* is required prior to INS interrogation of an individual. See the previous discussion of Dunaway v. New York and Marquez v. Kiley. In light of the confusion among the courts, however, the INS has adopted the lesser standard of suspicion of *alienage,* which provides the bare minimum of fourth amendment protection to individuals.

[36] The legal authority of INS officers to interrogate and arrest persons was interpreted by the Service guidelines in *Authority of Immigration and Naturalization Service to Make Arrests,* INS Manual M-69 (rev. May 1967). These guidelines were severely criticized by the courts as early as 1975 as "sorely lacking in appropriate guidelines for agents" as well as being "misleading and inadequate." Illinois Migrant Council v. Pilliod, 398 F. Supp. 882, 902 (N.D. Ill. 1975), *aff'd,* 540 F.2d 1062 (7th Cir. 1976), *modified on rehearing,* 548 F.2d 715 (7th Cir. 1977). As of November 1978, no complete revision of these guidelines had been implemented and made available to INS officers. David Crosland, INS General Counsel, testimony, Washington Hearing Transcript, p. 668.

[37] Karmiol Testimony, Los Angeles Open Meeting, p. 516.

[38] Ibid., p. 517.

[39] Joseph Sureck, testimony, Los Angeles Open Meeting Transcript, pp. 511-12, 518.

[40] Ibid., p. 511.

[41] Smith Affidavit.

[42] Gail Kee, affidavit executed June 30, 1978, filed in U.S. District Court, Central District of California, ILGWU v. Sureck, No. CV 78-0740-LEW (PX). INS has stated that, in its opinion, such interrogation of almost every person "is perfectly legal and proper. Immigration officers, pursuant to section 287 of the Act, may question persons believed to be aliens regarding their immigration status. There is no prohibition against seeking information about those suspected of being aliens from persons not suspected of being aliens." Leonel J. Castillo, Commissioner, INS, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Sept. 28, 1979, p. 5 (hereafter cited as Castillo Letter).

The Commission in no way suggests that INS officers do not have authority under section 287 of the Immigration and Nationality Act to conduct interrogations. But it is the position of this Commission that such interrogations must be conducted according to the prescriptions of the fourth amendment.

Testimony alleged that some INS officers, on the other hand, interrogate certain individuals solely on the basis of their skin color or ethnic appearance:

> The workers who are questioned once INS enters the workplace are questioned based upon one criteria, and one criteria alone, and that is their skin color, whether or not they appear to be Chicano. That is the only reason that persons are singled out. White persons are not questioned. Black persons are not questioned. Only brown-skinned persons are questioned.[43]

Similarly, David Carliner, an immigration attorney, testified that INS officers interrogate persons based solely on race or ethnic appearance and described an Immigration Service memorandum previously[44] justifying these actions:

> Typically an alien who is taken into custody is at a place of work, or apprehended while he's walking down the street, and the procedure is for an immigration officer who may or may not have a substantial basis for knowing that the person is an alien other than his impression of what he looks like. He looks Chinese, he looks foreign, he looks Mexican. He wears certain types of clothes. At one time they had an operational. . . .guideline of Immigration Service officers in New York whose description stated, "People who wore foreign-looking clothing and carried brown bags," they were assumed to be Spanish-speaking aliens from Spanish-speaking countries, because that combination, in the experience of Immigration Service, reflected [that] a person who had his lunch in this brown bag and. . .had foreign-cut clothing. . .was probably not a citizen of the United States [or probably] not even a permanent resident alien of the United States.
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> This is absurd. . .because all kinds of people carry brown bags these days and all kinds of people wear. . .foreign-cut clothing. That person could be a permanent resident alien and do both and be here perfectly legally. That person could have been stopped thousands of times by Immigration and Naturalization Service officers in New York and other cities.[45]

Another immigration attorney described an INS area survey in New York initiated in response to the filing of a complaint by representatives of several community organizations alleging that a large population of undocumented workers lived in their Queens neighborhoods. INS responded by sending approximately 100 or more investigators who were stationed at subway entrances in Jackson Heights and other communities, where they stopped and interrogated persons regarding their right to reside in the United States. INS selected persons for interrogation, he said, solely on their ethnic appearance:

> Well, they asked the black person. They asked the person of Latin ethnic characteristics. They asked the person whose dress looked a little different, the person who carred *El Diario* under his arm rather than the *New York Times*, and the person who carried the brown paper bag. . . .[46]

Ethnic appearance, he further stated, was the basis for selecting people for questioning during factory raids:

> when payroll records are exhibited to these agents by the employer who may or may not know his legal right to refuse to do so, it's been my experience and the experience of my colleagues that the names that are called out for interview are those that sound Latin, that sound Oriental, that sound East European. The Smiths and Joneses and Rosens are not interrogated. The Martinezes and Perezes and Lopezes and

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[43] Rosenbaum Testimony, Los Angeles Open Meeting Transcript, pp. 334–35.

[44] The guideline provided:

> The dress of an individual plays an important part in choosing to approach an individual and interrogate him. Experience has shown that persons from Latin and South American countries generally will retain their habit of wearing their clothing in a style that they were accustomed to in their native counties. Some may be wearing serapes. Others will be dressed in foreign-cut clothing, which is immediately distinguishable. Generally, their garb will be the type that is not associated with persons who have been residents in the New York area for sufficiently long periods of time. Another sign will be the fact that these persons, in addition to their dress, will also be carrying their lunch in brown paper bags.

Ben Lambert, INS Assistant District Director for Investigation, New York District, memorandum NYC 50/11, Jan. 16, 1973, printed in U.S., Congress, House, Committee on the Judiciary, Subcommittee on Immigration, Citizenship, and International Law, *Review of the Administration of the Immigration and Nationality Act*, 93d Cong., 1st sess. (1973), p. 32.

[45] David Carliner, testimony, Washington Hearing Transcript, p. 241.

[46] Leon Rosen, testimony, New York Open Meeting Transcript, vol. 1, pp. 222–23.

> Wangs are, and there is something drastically wrong with that system.[47]

In an INS search of the Sbicca Shoe Factory in California in May 1978, according to the *Los Angeles Times,* INS officers interrogated all Latino workers.[48] The *Times* reported that the INS sent 40 officers, many of them armed, to the factory, sealed the exits, and "in Spanish, ordered all employees to freeze"; all Latino workers were then required to produce documents establishing their immigration status.

INS officials have testified that interrogation based solely on race or ethnic appearance is not proper. Glen Bertness, INS Assistant Commissioner for Investigations, testified that "articulable facts" as to the *alienage* of an individual are required for questioning and noted that several factors should be considered in making this determination:

> Well, again, it would be a myriad of things, depending upon—it would be the way the person reacted when you walked down the assembly line, if you're talking about an assembly line situation. Many of them would be hidden in crevices and in rooms, which you would feel are articulable facts. And the refusal to speak to you, and their reaction to your being present when they found out that you were Immigration people would be the primary [consideration].[49]

While a person's race could be one factor, he stated, it alone would be insufficient to support the interrogation of any individual.[50] The courts have consistently held that interrogation of an individual based solely on race or ethnic appearance is unconstitutional.[51]

INS Definitions of "Reasonable Suspicion" to Search

In planning its area control operations, INS relies on several sources for information in determining possible locations or areas to search. Anonymous tips and police tips are all considered justifications for INS area control operations. Philip Smith, Assistant INS District Director for Investigations in Los Angeles, stated that most of the tips received by INS and used as a basis for area control operations are anonymous and the reliability of the informant cannot be checked prior to an operation:

> The majority are anonymous. When I say anonymous, the person who makes the report refuses to furnish his identity, and I have to presume, because if he is an employee there at the time or is applying for the job, he does not want to have his position put into jeopardy.[52]

The information provided by unknown informants is also questionable because of its lack of specificity. Mark Rosenbaum of the ACLU testified that INS factory raids are conducted without particular knowledge that certain specific undocumented workers will be present at the factory:

> First, as is clear, and as I think no one disputes, the raids themselves are raids that take place on the basis of at best. . .anonymous tips as to persons who may be undocumented workers. INS agents come to the factories involved without any particular knowledge that any particular person[s] in the factories have committed any violations or are here in violation of any laws. . . .[53]

While such information or tips would not be an acceptable basis for issuance of a criminal search warrant by an impartial magistrate,[54] INS finds no impropriety in relying on such information and has used these tips in planning and carrying out its area control operations. In a letter to the Commission, the INS stated:

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[47] Ibid., p. 224

[48] *Los Angeles Times,* Nov. 26, 1978, part VII 3, p. 44.

[49] Bertness Testimony, Washington Hearing Transcript, pp. 100–01.

[50] Ibid., p. 101. See also n. 91 of this chapter of the report.

[51] U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975); Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977); Marquez v. Kiley, 436 F. Supp. 100 (S.D.N.Y. 1977).

[52] Philip Smith, testimony, Los Angeles Open Meeting Transcript, p. 339. Another witness posed different, more questionable motives in reporting information to the INS:

> [P]erhaps we haven't witnessed in this country before a situation where family members, neighbors, can take vengeance and wreak vengeance upon one another simply because they can turn in someone who is undocumented. It has broken up families. It has caused terrible human suffering, and all of this because of the state of the present legislation.

Karvelis Testimony, New York Open Meeting Transcript, vol. 1, p. 121.

[53] Rosenbaum Testimony, Los Angeles Open Meeting Transcript, p. 334.

[54] The Supreme Court has held that hearsay evidence or tips provided by informants may properly be considered by a magistrate in issuing search warrants where a substantial basis for crediting the hearsay evidence is grounded on independent corroborative information or underlying circumstances which support the affiant's belief that the informant is credible and that his or her information establishes the existence of probable cause to believe that a violation of law has occurred. U.S. v. Harris, 403 U.S. 578 (1970); Aguilar v. U.S., 378 U.S. 108 (1964); Jones v. U.S., 362 U.S. 257(1960). Clearly, the reliability of an informant and of the information he or she provides cannot be determined where the informant remains anonymous and his or her information cannot be independently corroborated by INS because it is not specific. Warrantless searches based only on unverified telephone tips from unknown persons have been found to be without probable cause and therefore unconstitutional. Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

> It is also implied that the INS has carried out searches based on tips that would not support a search warrant. If consent is granted, no search warrant is needed. If a warrant is sought, it will not be granted if probable cause is lacking. The INS does not make searches unless it has reason to believe that it will find aliens who are illegally in the country. There is no impropriety in relying on tips to plan an area control operation.[55]

Certainly, search warrants should issue only upon a finding of probable cause, and consent, if it is a voluntary and knowing waiver, can obviate the need for a warrant. But where informants' tips provide the basis for a search or an area control operation, the tips should meet fourth amendment standards.

In selecting sites for its area control operations, INS accepts and at times acts on information provided by police departments. Although INS Regional Commissioner Edward O'Connor testified that, as a matter of policy, INS no longer conducts neighborhood sweeps,[56] INS officers will "assist" police departments under certain circumstances:

> I said [neighborhood sweeps are] possible. I did not say we were doing it. What we would do would be assist a police department when they needed us, possibly for our language ability. We are not today in this climate going out and sweeping neighborhoods anywhere in this country. We have enough work to do. There are enough people in industry that are here illegally. There are enough illegal aliens on farms and ranches and attempting to cross our borders, but we are not going into neighborhoods.[57]

Mr. O'Connor further stated that INS agents do not enter neighborhoods to apprehend aliens unless the police request their assistance in handling a "disturbance," defined as "something that would continually disturb a local police department."[58] He conceded that the police would need to communicate specific articulable facts[59] to indicate that illegal aliens were indeed involved or that "it is an area that is known that illegal aliens frequent."[60] He then cited east Los Angeles, a community with a predominantly Mexican American population, as an area that such aliens were known to frequent.[61]

Area control operations based on such generalized facts are questionable under current fourth amendment standards as enunciated by the courts.[62] They also conflict with INS Central Office policy as to the nature and amount of information to be supplied by police officers before INS conducts surveys of residential areas. Charles Sava, INS Associate Commissioner for Enforcement, stated that INS policy is to enter residential neighborhoods only where specific articulable facts exist to indicate that an undocumented alien is at a particular place:

> Our policy on going into residential and community areas is that, for area control operations. . .we go in only when we have information based on articulable facts which would allow us to know somebody is at a given place, a given address, and to work that information.
>
> As opposed to that, in non-area-control cases where we do have specific information and we are working a non-area-control type case, where we are not seeking out people in general but are looking for a specific person for a specific reason, to work that information.[63]

A complaint from a local police authority, he stated, could constitute specific articulable facts if such information was reliable and specified the number and location of suspected undocumented aliens:

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[55] Castillo Letter.

[56] Testimony received by the Commission indicated that INS cooperates with police departments in patrolling certain ethnic neighborhoods. Armando Navarro, executive director of the National Institute for Community Development, testified that the INS, in conjunction with local police, "harassed" persons attending church on Sunday for a period of several months. The church under surveillance was located in a barrio in Ontario, California, in a neighborhood whose population was primarily Mexican American. During this surveillance, residents were:

> Harassed in the sense that the presence of the police and the INS or the Border Patrol was very apparent every Sunday. In other words, it was commonplace on many occasions for individuals coming to the church on Sundays to be stopped by INS officials and asked for papers and so forth.

Armando Navarro, testimony, Los Angeles Open Meeting Transcript, p. 424.

[57] Edward O'Connor, testimony, Los Angeles Open Meeting Transcript, p. 538.

[58] Ibid., p. 515.

[59] In an internal memorandum of the INS Western Region, the Regional Commissioner stated:

> Service patrol and investigation officers conducting necessary inquiries in residential areas which are based upon receipt of information from responsible law enforcement authorities such as sheriffs, chiefs of police, etc., that undocumented aliens are located at a specific location. This information shall be interpreted as constituting "articulable facts" which warrant investigation.

INS Regional Commissioner, Western Region, memorandum to District Directors, Officers in Charge, and Chief Patrol Agents, Western Region, Feb. 7, 1978.

[60] O'Connor Testimony, Los Angeles Open Meeting Transcript, pp. 515–16.

[61] Ibid., p. 516.

[62] See n. 54 of this chapter of the report.

[63] Sava Testimony, Washington Hearing Transcript, p. 87.

> If we had found him to be responsible in the past; if he has proven himself to be a responsible person, where the information he gives is accurate, not misleading, and is, I'd say, a reasonable request, not just a very general thing. . . .If he could, I'd say, document his evidence, tell us how many, and where they are, we'd certainly work that.[64]

Search Warrants Used in Area Control Operations

The framers of the Constitution recognized that searches or seizures of individuals could result in the detainment or arrest of innocent persons and thereby cause a significant intrusion by the government upon those individuals. They sought to prevent general searches and seizures of individuals by including in the fourth amendment a provision that searches or seizures of persons could only be conducted where specific indications of a violation of law were present. This amendment states that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."[65]

Search warrants are sometimes used by the INS to enter premises to conduct area control operations for apprehending persons suspected of immigration law violations.[66] INS area control operations involving business establishments have been based on search warrants obtained under rule 41 of the Federal Rules of Criminal Procedure.[67] Because rule 41 warrants authorized only the search for property[68] that is evidence of a crime and not persons,[69] a Federal court, in an October 1978 decision, held that INS searches for undocumented workers at business premises under such warrants were not permissible.[70]

The search warrant in that case, *Blackie's House of Beef, Inc.* v. *Castillo,* [71] substituted the word "persons" in two places for the word "property." But in the blank space for "here describe property," the following was entered:

> Aliens who are believed to be in the United States in violation of United States Code, Title 8, Section 1325 and Section 241(a)(2) of the Immigration and Naturalization Act in that said aliens entered the United States without inspection.[72]

After the magistrate's recitation that he was "satisfied that there is probable cause," he "commanded" that the defendants search:

> the person or place named for the *property* specified. . .and if the *property* be found there to seize it, leaving a copy of this warrant and receipt for the *property* taken, and prepare a written inventory of the *property* and promptly return this warrant and bring the *property* before

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[64] Ibid.

[65] U.S. Const. amend. IV. For a discussion on the origin and history of the fourth amendment, see Nelson Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937).

[66] *See, e.g.,* Blackie's House of Beef, Inc. v. Castillo, 467 F. Supp. 170 (D.D.C. 1978); Memorandum in Support of Defendants' Motion to Dismiss at 1, 22, Intl. Ladies Garment Workers Union v. Sureck, CV 78-0740-LEW (PX) (C.D. Cal., memorandum filed June 30, 1978).

[67] Prior to Aug. 1, 1979, Fed. R. Crim. P. 41 provided, in pertinent part:

> (a) Authority to Issue Warrant
> A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property sought is located, upon request of a federal law enforcement officer or an attorney for the government.
> (b) Property Which May be Seized With a Warrant
> A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.
>
> . . . .
>
> (h) Scope and Definition
> [T]he term "property" is used in this rule to include documents, books, papers and any other tangible objects. . . .

[68] The proposition that "persons" are not "property" has been basic to American jurisprudence since the 1860s.

[69] Fed. R. Crim. P. 41 has recently been amended to authorize issuance of criminal search warrants to search for persons under certain circumstances. Rule 41, as amended, provides in pertinent part:

> (b) Property or Persons Which may be Seized With a Warrant
> A warrant may be issued under this rule to search for and seize any. . .(4) person for whose arrest there is probable cause, or who is unlawfully restrained.

The amended rule took effect on Aug. 1, 1979, and governs all criminal proceedings commenced thereafter. The applicability of the new rule to search warrants obtained by INS for undocumented aliens is unclear, as there has not yet been an opportunity for judicial interpretation and clarification of the rule's language. However, Blackie's House of Beef, Inc. v. Castillo (Blackie's II), 480 F. Supp. 1078 (D.D.C. 1979), although not involving a rule 41 warrant, indicates that search warrants for persons must particularly name and describe those persons who are the subject of the search and that such search warrants do not confer upon INS "officers a 'roving commission' to search the premises." *Id.* at 1088.

[70] Blackie's House of Beef, Inc. v. Castillo, 467 F. Supp. 170 (D.D.C. 1978). INS has appealed this decision, taking the position that the search warrant was properly obtained. Castillo Letter, p. 6.

[71] Blackie's House of Beef, Inc. v. Castillo, 467 F. Supp. 170 (D.D.C. 1978).

[72] *Id.* A copy of the search warrant accompanies the order in appendix A. *Id.* at 175.

> [the magistrate] as required by law. [emphasis added][73]

INS officers executed the warrant on March 30, 1978, and arrested 15 alien employees at the restaurant. Some of the arrested aliens had entered the country lawfully, while others had entered unlawfully.[74] The return of service required by the warrant disclosed that: "The following is an inventory of property taken pursuant to the warrant: see attachment: [listing arrestees]."[75]

The plaintiff in that case claimed that the INS search and the subsequent arrests "violated rights guaranteed by the Fourth Amendment and was an actionable trespass." The United States District Court for the District of Columbia held that the INS search conducted with the rule 41 warrant was "unreasonable and unlawful," and therefore the court entered a declaratory judgment in favor of the plaintiff.[76]

Rule 41 warrants, the court held, authorized searches only for property.[77] Because "persons are not property," searches for undocumented workers could not be conducted under such warrants. As the court reasoned:

> [I]t does not follow that the aliens in the restaurant are "tangible objects" and proper subjects of a search and seizure on a warrant issued pursuant to Rule 41. The government contention that the aliens in the restaurant were such "tangible objects" clashes with a fundamental written into our Constitution in the 1860's: no human being in the United States may be dealt with as property by government officials, or by any one else.
>
> Neither the Fourth Amendment nor any statute permits government officials to use a warrant commanding a search for property as authority to enter a privately owned restaurant in Washington, D.C. in search of illegal aliens believed to be working there.
>
> The Fourth Amendment authorizes issuance of warrants upon probable cause, "supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Here, however, the warrants did not authorize any search for persons, much less particularly describe them. It authorized only the search for and seizure of property.[78]

The court further held that "[t]he government's heavy reliance on the Supreme Court's decision in *Almeida-Sanchez v. United States* . . .is seriously misplaced."[79] In that case,[80] involving the warrantless search of an automobile 25 miles from the border conducted without probable cause, the INS argued that the search was analogous to an administrative inspection by a regulatory agency.[81] The Supreme Court rejected that analogy and stated:

> A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him.[82]

In *Blackie's*, the District of Columbia court also refused to justify the search on the administrative inspection theory, holding that "[t]he plaintiff here had not impliedly consented to the search by entering a regulated business."[83]

As a result of the decision of the District of Columbia court, the INS has begun using a civil search warrant, at least in the District of Columbia, to conduct area control operations of business establishments. After the invalidation of the rule 41 warrant, INS again conducted an area control operation at Blackie's House of Beef, under the civil warrant.[84] The affidavit supporting that warrant alleged the presence of "known illegal aliens" on the premises. Except for a few first names, however, the specific names of these "known" persons were not given. The warrant itself contained no names or any other identifying description of the persons sought, nor did it indicate the number of allegedly deportable aliens involved or whether such persons were employees, patrons, or passers-by. Although the warrant limited the search to daylight hours, it made no reference to the nature of Blackie's House of Beef's business or to the interests of innocent employees and patrons present during the lunch-hour inspection. A Federal court in the District of Columbia held that this search was illegal for three reasons: the search as conducted was unconstitutionally broad, the warrant was defective because it failed to describe with particularity the persons sought, and the warrant was defective because it failed to indicate that the magistrate had considered the search's effects on the restaurant's operations.[85]

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[73] *Id.*

[74] The Commission recognizes that persons who entered the United States legally but remained in violation of the law may be arrested without a warrant under exigent circumstances. 8 U.S.C. §1357(a)(2). No such issue was raised in *Blackie's House of Beef*, however, as the case focused on the validity of the search warrant used by INS.

[75] Blackie's House of Beef, Inc. v. Castillo, 467 F. Supp. 170 (D.D.C. 1978). A copy of the return of service and the attachment accompanies the order in appendix B. *Id.* at 176–77.

[76] *Id.* at 174.

[77] Fed. R. Crim. P. 41 has since been amended to authorize issuance of search warrants for persons where probable cause exists. See discussion in n. 69 of this chapter.

[78] 467 F. Supp. at 173.

[79] *Id.* (citations omitted).

[80] Almeida-Sanchez v. United States, 413 U.S. 266 (1973). The Court held that the warrantless search in that case was not supported by constitutional or statutory authority and was thus unreasonable and illegal.

[81] Administrative inspections conducted under warrant are permissible under the fourth amendment. See Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

[82] Almeida-Sanchez v. United States, 413 U.S. at 271.

[83] Blackie's House of Beef, Inc. v. Castillo, 467 F. Supp. at 174.

[84] Blackie's House of Beef, Inc. v. Castillo, 480 F. Supp. 1078 (D.D.C. 1979).

The INS asserts that the use of such civil warrants is authorized under the concurring opinion of Justice Lewis F. Powell in *Almeida-Sanchez*.[86] Although Justice Powell suggested that an area warrant procedure might be permissible, that suggestion was directed to roving automobile searches in border areas.[87] Because the nature of the intrusion in automobile searches was far less than in other situations, he indicated that such searches might be permissible. As he stated in his concurring opinion:

> [s]ignificantly, these are searches of automobiles rather than searches of persons or buildings. The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or a building. This Court "has long distinguished between an automobile and a home or office."[88]

Thus, the Powell concurrence does not explicitly authorize the use of a search warrant to search for persons suspected of immigration law violations in a business establishment. Moreover, a warrant lacking specificity in identifying the persons sought would violate the fourth amendment requirement for specific articulable facts, as it suggests a type of general search which the framers of the Constitution intended to prevent.

Effects of Area Control Operations

Area control operations as currently conducted by INS can have adverse effects on U.S. citizens and residents as well as on undocumented aliens. Austin Fragomen, an immigration attorney, testified that he believed most United States citizens would greatly dislike being interrogated by a law enforcement officer simply because of their ethnic appearance. "I think there are very few Americans who wouldn't find that offensive," he said.[89] Although the Commission has received testimony that persons are at times interrogated during INS area control operations based solely on their ethnic appearance,[90] INS has stated that it does not condone this practice.[91]

Another immigration practitioner stated that one effect of INS area control operations is to subject many persons, including U.S. citizens and residents, to unconstitutional searches and seizures[92] where no specific articulable facts concerning the presence of particular aliens unlawfully in the country exist to justify INS interrogations. He described a July 1978 incident in which the INS, with the cooperation of the Illinois State Police, the Iroquois County Sheriff, and a local police officer, allegedly barricaded the major thoroughfares[93] in and out of Onarga. The INS visited several business establishments or factories and arrested 30 to 40 persons and then conducted a door-to-door search in some sections of Onarga where a significant number of Mexican Americans resided. INS officers also conducted investigative stops of cars and people on the street, and some individuals were interrogated several times.[94]

United States citizens and residents who own and operate businesses that are surveyed by INS can also be adversely affected. Testimony received by the

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[85] *Id.* The court, however, did not address the question of whether INS is authorized to conduct administrative searches, noting that INS did not invoke "broad administrative" standards as authority for its search of plaintiff's premises. *Id.* at 1089–90.

[86] Almeida-Sanchez v. United States, 413 U.S. at 275 (Powell, J., concurring).

[87] In his concurring opinion, Justice Powell noted that it might be feasible:

> to obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time. . . . The use of an area warrant procedure would surely not "frustrate the governmental purpose behind the search."

Id. at 283 (citation omitted).

[88] *Id.* at 279 (citation omitted).

[89] Austin Fragomen, testimony, New York Open Meeting Transcript, vol. 1, pp. 266–67.

[90] See discussion in the text accompanying notes 43–48 of this chapter.

[91] INS takes the position that "the courts have consistently held that racial appearance alone is an insufficient basis for questioning a person regarding his immigration status, and it is not INS policy to follow such a practice." Castillo Letter.

[92] Kalman Resnick, testimony, Washington Hearing Transcript, p. 397.

[93] Armand Salturelli, INS Southern Regional Commissioner, testified that "we have no authority" to block off city streets for area control operations. Salturelli Testimony, Texas Open Meeting Transcript, vol. 4, pp. 358–59.

[94] Resnick Testimony, Washington Hearing Transcript, pp. 159–60.

Commission indicates that, contrary to INS statements,[95] INS area control operations do cause confusion and pandemonium among all factory employees, thereby disrupting a factory's operations and decreasing production.[96]

Undocumented persons who are arrested and detained by the INS during factory surveys but who are documentable and not immediately deported can also be adversely affected by INS area control operations. Until their immigration status is clarified by INS (which could take several weeks), their job prospects for that period would be uncertain:

> [O]ne of the problems, among many, [is] that after the survey is concluded, probably within the next 48 hours, a good many of those people will be back in the employment office asking for their old jobs back, and it is not easy to ascertain whether their detention by the Department of Justice resulted in any clarification of their status, or whether they are just as unclear when they come back after the survey than they were before the survey. . . .I am sure that [for] people who are apprehended in the survey [it] might possibly be several weeks before their status might be clarified. . . .[97]

Involvement of Local Police in Enforcement of Immigration Laws

The Immigration and Nationality Act expressly authorizes local police involvement in the enforcement of Federal immigration laws only in one instance. That one instance is the harboring provision, which provides that:

> No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.[98]

However, immigration law enforcement activities by local police, sometimes a direct result of previous encouragement by the Immigration and Naturalization Service,[99] have not been confined to the harboring section of the statute.

A Domestic Council committee study in 1976 found that the involvement of local law enforcement authorities in immigration created problems other than those normally arising from INS activities. It attributed these difficulties to "agencies. . .often unaware of usual policies in the enforcement of immigration law or hostile to the feelings of ethnic communities."[100]

Attempts by local police to enforce the immigration laws can infringe on the rights of United States citizens and legal residents. In Moline, Illinois, the city police department instituted a practice whereby its officers would enter local neighborhood establishments and interrogate persons of Latin ancestry about their status in the United States. Although the overwhelming majority of interrogatees were United States citizens or legal residents, the practice continued. A lawsuit was filed, alleging that United States citizens were arrested and placed in the local jail solely on a suspicion of violating Federal immigration laws. The Moline Police Department ultimately settled the suit and issued a statement of apology to the Latino community.[101] Although they have not yet been adjudicated, other lawsuits have been filed in California and Texas challenging the practice of local police enforcement of Federal immigration laws.[102] One case involved the arrest and incarceration for 3 days of an American citizen of Hispanic ancestry who was a passenger in a truck driven by a fellow employee. The complaint alleged that he was not charged with any crime but rather he was arrested solely because he did not have on his person the necessary documentation to prove his United States citizenship.[103]

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[95] In a letter to the Commission, the INS stated:

> In discussing the effects of area control operations conducted by the Service, the report states that pandemonium is often the result. The INS does not cause pandemonium. Persons who are not guilty of illegal conduct need not panic at the sight of a law enforcement officer. It is most often those persons whose status in this country is not legal who are likely to react with fear, confusion and flight.

Castillo Letter.

[96] George Lundquist, testimony, Texas Open Meeting Transcript, vol. 3, p. 9. Another factory owner agreed that INS surveys can result in loss of money and business to employers:

> [E]very time we are inspected, we sit down and talk to them [INS], say, "How are we going to avoid these inspections because it is very costly and disruptive. In fact we feel you are invading the rights of the citizens that are working here because they get no work done, and you are invading my rights because it costs me a lot of money to have my production line shut down for 3, 4, or 5 hours." Production is ruined for the whole day and possibly—in fact, production is ruined for a month, until we get back to normal in a plant our size.

Arnold Sbicca, testimony, Los Angeles Open Meeting Transcript, p. 402.

[97] Russell Parsons, consultant, Merchants and Manufacturing Association, testimony, Los Angeles Open Meeting Transcript, pp. 225–26.

[98] Immigration and Nationality Act of 1652, §274, 8 U.S.C. §1324(c) (1976).

[99] The Border Patrol Handbook, page 11-7, provides that the "continued cooperation (of all local law enforcement authorities) must be sought and cultivated." INS encouragement of immigration law enforcement by local police has been recognized in INS correspondence such as form letter LIV 40/15-C of the Pleasanton, Calif., Border Patrol Office which states that "[s]ince. . .the early 1950's we have earnestly solicited the assistance of the various sheriff's departments and police agencies in picking up and holding for us aliens illegally in the United States."

[100] Domestic Council Committee on Illegal Aliens, *Preliminary Report* (1976), p. 207.

[101] Resnick Testimony, Washington Hearing Transcript, p. 159.

[102] Savala v. Castillo, No. F-78-173-Civ. (E.D.Cal. filed Aug. 30, 1978) (verified petition for removal of a civil action from a State court); Rivera v. Ballard, CA3-79-0874-C (N.D. Tex. filed July 6, 1979); Cervantez v. Whitfield, CA2-79-206 (N.D. Tex. filed Dec. 12, 1979).

The problems created by local police attempting to enforce Federal immigration laws are exemplified by the following testimony from a trial on traffic-related charges. In that case, an American citizen of Mexican ancestry had also been held in jail for 3 days on a "hold for investigation of illegal entry." During the trial, the arresting police officer gave the following testimony during cross-examination:[104]

> Q: What was that charge?
>
> A: Investigative charge of illegal entry.
>
> Q: That charge, you didn't write him a citation on that charge, did you?
>
> A: No, sir. That's investigative charge.
>
> Q: And you knew that he was wanted by immigration?
>
> A: No, sir.
>
> Q: But you just filed that charge?
>
> A: Investigative charge.
>
> Q: Investigative charge. Did you ever take that charge off?
>
> A: I don't know. Somebody evidently did. I didn't.
>
> Q: You never took the charge off?
>
> A: No, sir.
>
> Q: Now is this the normal routine that you follow when you arrest Mexicans in Grand Prairie?
>
> A: Are you speaking of an illegal alien or a Mexican?
>
> Q: Well, how can you tell the difference? Do you know what the difference is?
>
> A: No, sir. When I can't determine, that's why I put them in jail for investigative charges.
>
> Q: So you might be putting American citizens in jail?
>
> A: It's possible.
>
> Q: That's all right then?
>
> A: Yes, sir.
>
> Q: They have to prove that they are American citizens?
>
> A: Yes, sir.

Both the Attorney General and the INS have recently attempted to curtail local police practices of enforcing the immigration laws. In a June 1978 press release, then Attorney General Griffin Bell stated that "the responsibility for enforcement of the immigration law rests with the Immigration and Naturalization Service (INS), and not with state and local police."[105] Therefore, local police officers should "not stop and question, detain, arrest or place an 'immigration hold' on any persons not suspected of crime, solely on the ground that they may be deportable aliens."[106] More than a year prior to that press release, the INS Central Office sent the following instructions to its Regional Commissioners:

> There are no provisions in the [Immigration and Nationality] Act other than Section 274 which [authorize] the arrest and/or detention of aliens for violations of the Immigration and Nationality Act by anyone other than an immigration officer. Accordingly, each office shall take whatever steps are necessary to insure local city, county, and state authorities. . .do *not* detain or place "holds" on aliens for or in behalf of this Service unless an immigration officer has first made a determination that the alien is *prima facie* deportable from the United States and has specifically authorized the detention of the alien.[107]

The INS has recently informed the Commission, however, that it believes there is implicit authority for local police involvement or assistance in the enforcement of the criminal provisions[108] of the Federal immigration laws. It stated:

> The absence of express authority in the Immigration and Nationality Act for local police to

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[103] Cervantez v. Whitfield, CA2-79-206 (N.D. Tex. filed Dec. 12, 1979).

[104] Cross-Examination Transcript at 34–35, Texas v. Rivera, Nos. CCr-78-9668-D, CCr-78-9669-D, CCr-78-9670-D (Dallas Cty, Tex. Crim. Ct. of Appeals, Mar. 6, 1979).

[105] U.S., Department of Justice, Press Release, June 23, 1978.

[106] Ibid.

[107] INS Deputy Commissioner Green, memorandum to the INS Regional Commissioners, Jan. 10, 1977. Mr. Green left the Service later that year.

[108] E.g., the provisions of immigration law which make it a felony to bring in and harbor certain aliens. 8 U.S.C. §1324(1976).

> aid in the enforcement of the immigration laws does not necessarily preclude such assistance. State law may authorize state and local police to enforce the criminal provisions of the federal immigration laws. The Attorneys General of California and Texas, and, to a certain extent, the Attorney General of the State of Washington, have determined that some or all of their state and local enforcement officers do have authority to enforce the federal criminal laws. It is true that it has long been Service and Department of Justice policy, as reaffirmed by the U.S. Attorney General on June 23, 1978, that local police have no authority to arrest persons solely on the ground that they may be aliens illegally in the United States. However, they are encouraged to notify the INS of any persons in local custody for *state or local criminal violations* whom they suspect of alienage. [emphasis added][109]

Notwithstanding the policy statements of the Department of Justice, some local police have apparently continued in their attempts to enforce Federal immigration laws. One newspaper reported that officers of the El Paso Police Department "pick up the aliens and return them to the Mexican side of the frontier."[110] A witness in San Diego charged that local police continue to attempt enforcement of the immigration laws,[111] and even an INS District Director acknowledged that local police are continuing to place "immigration holds" on persons suspected of immigration violations:

> [That earlier witness] may have information that there are some police officers bringing aliens to the county sheriff's office here and placing a hold against them for the Immigration Service. We are having that particular problem now.[112]

The type of conduct alleged in the above cases indicates that local police lack sophisticated, technical expertise in immigration law and that they have difficulty making determinations as to citizenship, immigration status, or the validity of immigration documents. Because they receive little or no training in immigration law, it can be expected that local police will make erroneous determinations of immigration law violations or base immigration arrests upon impermissible, even unconstitutional, grounds. The allegations of the above cases illustrate the potential consequences when local police authorities attempt to enforce the immigration laws. In those cases, the local police officers allegedly made some investigative stops and arrests despite the lawful status of the detained person, and they made other investigative stops and arrests on the basis of racial or ethnic characteristics identifiable with major immigrant groups. Courts have consistently held that ethnic appearance alone does not constitute the necessary reasonable suspicion for an investigative stop, much less an arrest.[113]

There are currently few restraints on local police to prevent constitutional violations that may result from their immigration law enforcement activities. Although the Attorney General has issued a statement urging local police to refrain from making arrests solely for immigration law violations[114] and the INS has instructed its offices to ensure that local police involvement ceases, local police are not accountable to the Department of Justice. Further, while the Justice Department officially discourages local police involvement, it is the policy of at least some local INS offices to continue accepting persons arrested by local police on suspicion of violating immigration laws.[115]

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[109] Castillo Letter.

[110] *Los Angeles Times*, Aug. 10, 1978. In a letter to the Commission, the El Paso Police Department explained its policy as follows:

> It is the El Paso Police Department's policy not to enforce the Immigration Laws or pick up an alien simply because he is an alien. The only time an officer from the El Paso Police Department will pick up an alien is when that alien has been involved in some sort of criminal activity. It is commonplace for the police officers, once he (sic) has ascertained that this individual is an alien, to take the person to the border and release him. This is done to avoid the overcrowded situation in the El Paso County Jail which will result if all aliens were booked on relatively minor offenses. It has been our experience that if aliens were booked and prosecuted the courts will only deport them and no criminal punishment will be assessed against that person.

Roberto A. Duran, police legal advisor, El Paso Police Department, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Feb. 4, 1980.

[111] Herman Baca, testimony, San Diego Open Meeting Transcript, p. 96.

[112] Joseph Sureck, then INS District Director for Los Angeles, testimony, Los Angeles Open Meeting Transcript, p. 580.

[113] United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Cheung Tin Wong v. INS, 468 F.2d 1123 (D.C. Cir. 1972); Illinois Migrant Council v. Pilliod, 398 F.Supp. 882 (1975), *aff'd* 540 F.2d 1062 (7th Cir. 1976); Marquez v. Kiley, 436 F. Supp. 100 (1977).

[114] U.S., Department of Justice, Press Release, June 23, 1978; INS Deputy Commissioner Green, memorandum to INS Regional Commissioners, Jan. 10, 1977.

[115] Despite the efforts of the Justice Department, some local police departments are continuing to detain persons on suspicion of immigration law violations under what is commonly referred to as an "immigration hold" until the police deliver the suspects to the INS or the Service picks them up from local police detention facilities. Sureck Testimony, Los Angeles Open Meeting Transcript, pp. 582, 583; Walter V. Edwards, Associate Regional Commissioner for Enforcement, INS Southern Region, testimony, Texas Open Meeting Transcript, vol. 4, p. 371.

Findings and Recommendations

Finding 6.1: The INS has failed to update its 1967 handbook, *Authority of Immigration and Naturalization Service to Make Arrests* (INS Manual M–69), which contains guidelines for interrogations and arrests of aliens by INS officers. Since its publication in 1967, several Supreme Court decisions interpreting the fourth amendment have restricted the conditions under which law enforcement officers are authorized to conduct searches and seizures. Although the INS has stated that a complete revision of that handbook is underway, no revised edition has been published. The failure of INS to issue a revised edition has resulted in criticism from the courts.

Recommendation 6.1: The INS should complete the revision of the handbook on INS arrest and interrogation authority and make it available to Service officers immediately in order to clarify for those officers the legal authority under which they may interrogate and arrest persons suspected of violations of the immigration laws.

Finding 6.2: INS area control operations have built into them procedures that can and do in some instances result in persons, including United States citizens and residents, being subjected to unconstitutional searches and seizures.

INS officers apparently select interrogatees during area control operations in one of three ways: (1) all persons within the target area; (2) on the basis of ethnic appearance; and (3) on the basis of a mere suspicion of alienage. INS area control operations are "unreasonable" seizures because each of the three standards currently used to determine which persons shall be interrogated during area control operations is constitutionally defective:

- The interrogation of all persons within a target area implies the absence of any interrogation selection criteria, violating the fourth amendment requirement of a reasonable suspicion based on specific articulable facts that each person interrogated has violated the law;
- The selection of interrogatees on the basis of ethnic appearance is constitutionally impermissible without the presence of other factors giving rise to a reasonable suspicion; and
- The selection on a mere suspicion of *alienage*, even where based on articulable facts, is insufficient to justify interrogations of individuals during area control operations, because such surveys can be considered "seizures" under the fourth amendment and therefore require a suspicion of *unlawful presence* to detain persons.

Recommendation 6.2: INS should immediately cease its area control operations, as currently conducted, to prevent the continued violation of the constitutional and civil rights of individuals. INS interrogations of persons should be based only upon specific articulable facts which create a reasonable suspicion that the individual is unlawfully present in the United States in violation of the immigration laws.

Finding 6.3: Search warrants used by the INS to conduct area control operations are legally impermissible unless they conform to fourth amendment standards.

Criminal search warrants (see rule 41 of the Federal Rules of Criminal Procedure) and civil search warrants (see *Blackie's House of Beef, Inc.* v. *Castillo*, 480 F. Supp. 1078 (D.D.C. 1979)) must be based on probable cause and must name and describe with sufficient particularity the person or persons who are the subject of the search.

Civil warrants based on an administrative inspection theory may not properly be used by INS to search for persons suspected of immigration violations in business establishments where such businesses are not regulated and licensed and where the persons sought are not specifically named.

Recommendation 6.3:

a. Future INS searches should be based upon warrants that are supported by probable cause and that name and describe specifically the person or persons who are the subject of the search.

b. INS should discontinue its attempts to obtain warrants under an administrative inspection theory, since the courts have held that only regulated businesses are subject to such searches.

Finding 6.4: Local police involvement in enforcing the immigration laws has resulted in violations of the constitutional rights of American citizens and legal residents.

Although the Immigration and Nationality Act expressly authorizes local police involvement in the enforcement of Federal immigration laws in only one instance,[116] local police departments have not confined their enforcement of those laws to that portion of the statute. This expanded local police involvement has continued, notwithstanding admonitions from the Department of Justice and the Immigration and Naturalization Service that enforcement of immigration laws is the responsibility of INS.

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[116] 8 U.S.C. §1324(c)(1976).

Recommendation 6.4: Congress should clarify the Immigration and Nationality Act to specify that immigration laws should only be enforced by INS.

Chapter 7

Rights of Detainees After Detention or Apprehension

If the banishment of an alien from a country. . .where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for. . .be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied. [1]

At several points in this nation's history, its treatment of noncitizens within its borders has been inhospitable, often disgraceful.[2] Although treatment of aliens and attitudes toward them have improved in many respects, it nevertheless remains true that aliens today are often relegated to second-class status, notably in the meager due process protection provided in administrative proceedings to expel them from the country.[3] The effect of the deportation laws is particularly acute for those people who are precluded or hindered in legal admission into the United States because of immigration admissions policies that favor some nationalities over others.[4] This discrimination in the immigration admissions policy is further compounded by a deportation process that can result in the expulsion of aliens in circumstances where they might have been granted relief from deportation if they were members of a different nationality.[5] In many instances, an American family suffers the gravest consequences of this discrimination, for the result is either denial of an opportunity for the reunification of the family or the disruption of the family unit.

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[1] Fong Yue Ting v. United States, 149 U.S. 698, 740–41 (1893) (Brewer, J., dissenting) (quoting President James Madison, 4 Elliot's Debates 555).

[2] During periods of anti-alien hysteria in this country, citizens and resident aliens identifiable with major immigrant groups have often suffered harassment and contemptuous treatment from law enforcement officials. The sinophobia of the late 19th century that resulted in a national drive to exclude Chinese from American boundaries led to localized expulsion efforts such as the one that occurred "[i]n 1903 [when] the Chinese ghetto in Boston was cordoned off and surrounded by police and 234 Chinese were arrested solely in order to find 40 persons sentenced to deportation." S. Lyman, *The Chinese Americans* (1974), p. 69. Years later these local tactics were to be replaced by nationally coordinated expulsion drives. In early 1920 President Wilson's Attorney General, A. Mitchell Palmer, conducted a series of raids on homes, seeking out radicals, communists, and aliens. On a single night in January 1920, more than 4,000 alleged communists in 33 different cities were arrested; of 5,000 arrest warrants sworn out for aliens, only a few more than 600 aliens were actually deported. S. Morison, *The Oxford History of the American People* (1965), pp. 883–84.

In 1954 the INS instigated "Operation Wetback," an unprecedented campaign to locate and remove undocumented Mexican aliens from the United States. "Assisted by Federal, state, county, and municipal authorities—including railroad police officers, custom officials, the FBI, and the Army and Navy—and supported by aircraft, watercraft, automobiles, radio units, special task forces, and perhaps most important of all, public sentiment, including that of growers, the Border Patrol launched the greatest maximum peacetime offensive against a highly exploited, unorganized and unstructured 'invading force' of Mexican migrants." J. Samora, *Los Mojados—The Wetback Story* (1971), p. 52. "With military proficiency, a total of 1,075,168 illegal Mexican aliens were apprehended." "Among other things, Operation Wetback demonstrated the precarious status of Mexicans in the United States and exhibited their vulnerability to regulation and control, but more specifically their vulnerability to a single government agency. A sizable, indeterminate proportion of the Mexican population residing in the United States in the 1950s was removed by the INS and returned to Mexico. Perhaps as much as one-sixth of the total Mexican-origin population living in this country was deported." G. Cardenas, "United States Immigration Policy Towards Mexico: A Historical Perspective," *Chicano Law Review*, vol. 2 (1975), pp. 66, 81 (footnotes omitted).

[3] In commenting on this report, the INS stated:

> This chapter, concerning the deportation of aliens, makes repeated references to the "meager" due process protections afforded aliens in deportation hearings. The Service disagrees with this characterization of an alien's rights. Section 242(a) of the I&N Act, 8 U.S.C. 1252(a), provides that the following procedures are required at deportation proceedings:
>
> (1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;
>
> (2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;
>
> (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and
>
> (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.
>
> In addition, the Service requires that all immigration judges (Special Inquiry Officers) be attorneys. Only quasi-judicial functions are performed by immigration judges thereby avoiding a possible conflict of interest. Moreover, the Attorney General has created a Board of Immigration Appeals, which is entirely separate from the INS, to hear appeals from decisions of immigration judges. Board decisions may be reviewed in Federal Court.

Leonel Castillo, Commissioner, Immigration and Naturalization Service, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Sept. 28, 1979 (hereafter cited as Castillo Letter).

Although aliens in the United States, regardless of status, are acknowledged to be "persons" within the meaning of the 14th amendment, and thus entitled to due process protection,[6] early Supreme Court cases involving the deportation of aliens limited the requirements of due process in deportation cases.[7] The Supreme Court in these early cases classified deportation as a *civil* proceeding. Since certain constitutional rights, such as the right to counsel, the right against self-incrimination, and the prohibition against *ex post facto* laws, have been considered to be available only in criminal proceedings,[8] the designation of deportation as a civil proceeding has operated to deprive aliens of any real measure of due process. Today, this classification remains a major obstacle to the extension of full due process protections warranted by the often extreme consequences of deportation.

Because the rights of detainees after detention or apprehension hinge on this judicial distinction, an analysis of the evolution of the "civil" classification of deportation proceedings is necessary. The analysis will provide the historic background for the later discussion of specific constitutional guarantees with respect to the right to counsel, the right to bail, the right to an impartial hearing, and the use of administrative arrest warrants by INS.

Deportation as a Civil Proceeding

It has been generally accepted that the power to prevent aliens from entering this country is derived from the Nation's sovereign power and is not dependent on any provision in the Constitution explicitly authorizing exclusion. The assumption has been made through the years that the power to prevent persons from entering this country also gives rise to the power to expel persons after their entry into the United States:

> The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons and are in truth but parts of one and the same power.[9]

Because the sovereign power was viewed as unassailable by the judiciary, the courts held that the legislative and executive branches of government are free to determine who will be excluded or expelled.[10]

Deportation is conceded by many to be a serious action, yet because it is said to arise from the sovereign power, the courts have been unwilling to curtail or limit the power to deport. The designation of deportation as a civil proceeding, which removed the expulsion process from strict constitutional scrutiny, stems from the Supreme Court's refusal to

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This chapter of the report refers to the "meager due process protection provided in administrative proceedings." Administrative proceedings, as used here, includes not only deportation hearings but also any other administrative device to remove a person from the country, such as voluntary departure without a deportation hearing. Many arrested persons elect voluntary departure without an opportunity to consult with counsel. Those who elect such voluntary departure are potentially waiving their eligibility under the immigration laws for relief from deportation that would entitle them to remain in this country lawfully. Because of the severity of the punishment of deportation, it is the position of this Commission that the right to counsel should be provided at that critical administrative stage of the deportation process.

The Commission does not dispute the availability of certain due process protections during deportation hearings. But we note that those protections are *only* available at deportation hearings. Only a small percentage of persons arrested for immigration law violations receive such a hearing. See testimony of Chief Immigration Judge Herman Bookford, before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 14–15, 1978, p. 275 (hereafter cited as Washington Hearing Transcript).

[4] See chapter 2.

[5] For example, relief from deportation under 8 U.S.C. §1255 (1976) is not available to deportable aliens from every country. Aliens who were admitted under nonimmigrant visas but who are deportable for overstaying their visas would be eligible to adjust their status to that of persons admitted for permanent residence if they met three requirements under that section of the Immigration and Nationality Act: (1) they apply for adjustment of status; (2) they qualify for an immigrant visa under the preference system; and (3) an immigrant visa under that preference category is available. Because of the smaller number of immigrant visas available to Hong Kong (600 per year) than to England (20,000 per year), immigrant visas are rarely immediately available to aliens from Hong Kong. Thus, an alien from Hong Kong who applied for adjustment of status and who qualified for a sixth preference immigrant visa could not obtain relief from deportation under 8 U.S.C. §1255 (1976), while an alien from England would be able to do so (as of February 1979).

[6] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[7] Fong Yue Ting v. U.S., 149 U.S. 698, 730 (1893); The Japanese Immigrant Case, 189 U.S. 86, 97 (1903); Zakonaite v. Wolf, 226 U.S. 272, 275 (1912).

[8] Mahler v. Eby, 264 U.S. 32 (1924); Bugajewitz v. Adams, 228 U.S. 585, 586 (1913); Galvan v. Press, 347 U.S. 522 (1953).

[9] Fong Yue Ting v. U.S., 149 U.S. at 713.

[10] *Id.*; Harrisades v. Shaughnessy, 342 U.S. 580 (1951).

consider deportation to be a form of punishment, though the consequences of deportation have been frequently assailed by individual members of the Court as being too severe.

Beginning with the Chinese Exclusion Act of 1882,[11] which precluded the immigration of Chinese laborers, immigration legislation has sought to determine who can enter the country, as well as on what terms. Immigration restriction laws in the decade following the passage of the Chinese Exclusion Act created certificate requirements for Chinese who desired to enter, reenter, or remain in the United States.[12] Under the 1892 act, Chinese already residing in this country were required to obtain and carry identification papers, known as "certificates of residence."[13] Those not possessing such certificates were subject to deportation.

These acts did not go unchallenged. In *Fong Yue Ting* v. *United States,* [14] the petitioners contended that the 1892 act was unconstitutional and denied them due process of law without a judicial hearing. Although a strong dissent[15] argued against deportation because it amounted to banishment[16] and a deprivation without due process of law,[17] the majority opinion rejected those contentions. Instead, it held that the Nation's sovereign power allowed the Federal Government to set the conditions and procedures under which persons could enter, remain, or be expelled from this country;[18] that deportation was not punishment;[19] and thus, that deportation was not a deprivation "of life, liberty or property, without due process of law."[20]

In *Wong Wing* v. *United States,* [21] the petitioner argued that deportation was in the nature of punishment and could not be imposed without a trial. The Court rejected the argument, citing *Fong Yue Ting,* and reaffirmed the power of the Federal Government to deport aliens. Nevertheless, the Court began to limit the Federal Government's power over aliens in other respects by ruling that administrative procedures could not be used to detain and sentence aliens under a law that made failure to have certificates of residency a criminal offense. If it wished to impose a criminal sentence, the Court said, the Federal Government would have to institute criminal proceedings. This case was the first in a long line of cases that extended some constitutional protections to aliens, but, at the same time, upheld the absolute power of the Government to deport.

In *Bugajewitz* v. *Adams,* [22] the petitioner was being deported under a Federal immigration statute as a prostitute, although she could have also been tried in criminal proceedings for a violation of local law. The Court held that this decision did not make deportation a punishment for a crime, but was "simply a refusal by the government to harbor persons whom it doesn't want."[23]

In *Ng Fung Ho* v. *White,* [24] the Court reiterated the Federal Government's power to deport and its power to do so by *executive* proceedings. However, the Court required that a judicial determination must be made of the petitioner's claim to United States citizenship, since Executive orders for deportation are only valid as to aliens. Justice Louis Brandeis wrote that such a judicial proceeding was necessary because the person was facing deportation, which:

> may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.[25]

Despite the acknowledged harsh consequences of deportation, the Court was still reluctant to equate deportation with punishment.[26]

With the failure of direct attacks on the power to deport, efforts turned to invoking individual constitutional rights in deportation cases. The continuing classification of deportation as a civil proceeding has severely limited the relief to be obtained from the courts. However, the courts, although they felt compelled to follow earlier decisions that Congress has unfettered discretion to regulate immigration, have attempted to mitigate the harsh effects of deportation by strictly and narrowly construing any law that was the basis for deportation.

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[11] Ch. 126, 22 Stat. 58 (1882).

[12] Ch. 220, 23 Stat. 115 (1884); ch. 1015, 25 Stat. 476 (1888); ch. 1064, 25 Stat. 504 (1888); ch. 60, 27 Stat. 25 (1892).

[13] Ch. 60, 27 Stat. 25 (1892).

[14] Fong Yue Ting v. U.S., 149 U.S. 698 (1893).

[15] *Id.* at 732 (Brewer, J. dissenting); *id.* at 741 (Field, J., dissenting); *id.* at 761 (Fuller, C.J., dissenting).

[16] Banishment has been recognized as punishment when applied to citizens. *See* State v. Doughie, 237 N.C. 368, 74 S.E. 2d 922 (1953).

[17] In his dissenting opinion in *Fong Yue Ting,* Justice Brewer stated:

> Section 6 [of the 1892 act] deprives of "life, liberty, and property without due process of law." It imposes punishment without a trial, and punishment cruel and severe. It places the liberty of one individual subject to the unrestrained control of another. . . .Deportation is a punishment. It involves first an arrest, a deprivation of liberty; and, a second, a removal from home, from family, from business, from property.

149 U.S. at 739–40.

[18] *Id.* at 713, 731.

[19] *Id.* at 730.

[20] *Id.*

[21] 163 U.S. 228 (1895).

[22] 228 U.S. 585 (1913).

[23] *Id.* at 591.

[24] 259 U.S. 276 (1922).

[25] *Id.* at 284–85.

[26] Quite naturally, the pronouncements of the Supreme Court were followed in the lower Federal courts. In Constanzo v. Tillinghast, 56 F.2d 566 (1st Cir. 1932), *aff'd on other grounds,* 287 U.S. 341 (1932), for example, the court rejected the contention that deportation constituted cruel and inhuman punishment under the eighth amendment, notwithstanding that Constanzo had entered the United States as an infant, had lived in this country for over 25 years, and had established a family here.

The Court's differing interpretations of a deportation statute explain the different results in *Galvan* v. *Press* [27] and *Rowoldt* v. *Perfetto.* [28] Those cases centered on the Internal Security Act of 1950,[29] as amended,[30] which provided for the deportation of members of the Communist Party. In *Galvan,* the earliest case, the Court reasoned that Congress had found the Communist Party, then a legal political organization in California, to be dedicated to the violent overthrow of the Government and accordingly made membership alone sufficient grounds for deportation. But in *Rowoldt,* the Court held that the law required the membership to be "meaningful" in order to be grounds for deportation. The Court relied on its holding in *Rowoldt* to grant relief from deportation to another petitioner.[31] In that case, the majority opinion stated that: "deportation is a drastic sanction, one which can destroy lives and disrupt families and that a holding of deportability must therefore be premised upon evidence of meaningful association."[32] From these three cases it can be seen that the Court moved from a broad construction of congressional language to a more narrow construction in order to avoid the harshness of deportation.

The courts have also been able to offer a measure of relief by a narrow definition of the word "entry." Certain events, such as receiving public welfare or convictions for crimes of moral turpitude, are grounds for deportation if they occur within a certain time period after *entry* into the United States. *Delgadillo* v. *Carmichael* [33] involved a legal resident crewman whose ship, because it was surrounded by the enemy, was forced to dock at a foreign port before completing its journey from Los Angeles to New York. The Court held that his return from that foreign port to the United States did not constitute an entry, for "entry" meant more than just the physical act of entering the United States; it had to involve coming voluntarily from a foreign port.[34] In reaching its decision, the Court stated, "Deportation can be the equivalent of banishment or exile. The stakes are indeed high and momentous for the alien who has acquired his residence here."[35]

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[27] Galvan v. Press, 347 U.S. 522 (1953). In that case, the Court found nothing unconstitutional about the retroactive nature (i.e., *ex post facto* effect) of the Internal Security Act of 1950, which made being or having been *at any time in the past* a member of a communist organization grounds for deportation. Galvan, who had entered the United States in 1918, had joined the Communist Party in 1944 when it was a legal political organization with candidates appearing on California election ballots but had terminated his membership in 1946. Under the 1940 Alien Registration Act, ch. 439, 54 Stat. 670, in effect at the time of his membership, a showing that Galvan actually did advocate the violent overthrow of the Federal Government was required before he could be deported. But the majority opinion in *Galvan* held that the 1950 act "dispensed with the need for such proof" and made mere membership in the Communist Party a sufficient ground for deportation. The majority further held that Galvan's membership was not so "nominal" as to provide him with relief from deportation under a 1951 amendment to the Internal Security Act. *Id.* at 526–29.

The Court, however, did recognize the similarity between deportation and punishment and seemed to lament the earlier decisions:

> much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in requlating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though *applicable only to punitive legislation,* should be applied to deportation. [emphasis added]

Id. at 530–31.

Nevertheless, the Court believed the question as to whether deportation was a civil proceeding and whether the ban on *ex post facto* laws ever applied to civil proceedings had long been settled, and it rejected the appeal. The dissent looked at the disastrous consequences to the petitioner and argued against the deportation of one who had lived in the United States for 36 years:

> Now in 1954, however, petitioner is to be deported from this country solely because of his past lawful membership in that party. . . .For joining a lawful political group years ago—an act for which he had no possible reason to believe would subject him to the slightest penalty—petitioner now loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country.

Id. at 532–33.

[28] Rowoldt v. Perfetto, 355 U.S. 115 (1957). In that case, the Court found the evidence to be insufficient to support an order for deportation. Rowoldt had entered the country in 1914 and became a dues-paying member of the Community Party in 1935. Under the Internal Security Act, as interpreted in *Galvan,* such membership was an immediate ground for deportation. However, the 1951 amendment to that act exempted persons from deportation based on Communist Party membership where that affiliation was involuntary. The Court, in granting Rowoldt relief from deportation, declared that the 1951 amendment required the membership to be "meaningful." *Id.* at 120. The dissent pointed out the inconsistency of not deporting this petitioner when Galvan was found to be deportable under very similar circumstances.

[29] Ch. 1024, 64 Stat. 987 (1950).

[30] Ch. 23, 65 Stat. 28 (1951).

[31] Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963).

[32] *Id.* at 479.

[33] 332 U.S. 388 (1947).

[34] In a similar case that year, a Federal appeals court reached the same conclusion. In Di Pasquale v. Karenuth, 158 F.2d 878 (2d Cir. 1947), the petitioner, on a trip from Buffalo, New York, to Detroit, Michigan, had taken a train whose route passed through Canada at one point. The question before the court was whether that trip constituted an entry for the purpose of measuring whether a criminal conviction had occurred within 5 years after the alien's entry, thus making petitioner deportable. The court answered that an entry must be voluntary, not simply an accident.

[35] 332 U.S. at 391 (footnotes omitted).

The phrase "sentenced more than once of crimes involving moral turpitude" was the subject of *Fong Haw Tan* v. *Phelan.* [36] In this case, the petitioner had been convicted on two different counts of a single indictment. The circuit courts differed as to whether this phrase meant any conviction beyond the first sentence or whether it required conviction for crimes involving two different incidents. The Court decided that the Immigration Act intended to deport those who commit a crime and are sentenced and then commit another and are sentenced again. Therefore, Fong Haw Tan was not deportable. The Court cited *Delgadillo* v. *Carmichael* for the proposition that deportation can amount to banishment and a deportation statute thus requires strict construction. Deportation, the Court said, "is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty."[37]

Another ground on which long-time residents may be deported is a conviction for possession or use of drugs or narcotics. Federal courts have strictly construed the term "conviction" in some cases to mitigate the harshness of deportation. In *Rehman* v. *INS,* [38] the court read "conviction" very narrowly. It found that under Federal law in an analogous case the simple possession of hashish with which petitioner was charged could be expunged from the record and there would then be no "conviction" for the purpose of deportation. Also, since the petitioner was given probation, the court found no real "conviction" existed.

In *Lennon* v. *INS,* [39] the musician was an excludable alien at the time of entry because of a prior British conviction for possession of hashish. British law, unlike American, did not require proof that an individual knowingly possessed the drug for conviction. Because of this difference, the court found that the musician's conviction in Britain could not be used to exclude or deport him.

> Deportation is not, of course, a penal sanction. But in severity it passes all but the most Draconian criminal penalties. We therefore cannot deem wholly irrelevant the long unbroken tradition of the criminal law that harsh sanctions should not be imposed where moral culpability is lacking.[40]

One final example of statutory construction by the courts to avoid the dire consequences of deportation is *Lok* v. *INS.* [41] In that case, petitioner Lok asserted that he was eligible for discretionary waiver under the law.[42] To be eligible for that type of discretionary relief under the statute, an individual must have been a domiciliary of the United States for 7 consecutive years. The issue before the court was whether or not this 7-year period must be a "lawful unrelinquished domicile" or must accrue after that individual was "lawfully admitted for permanent residence." The Court noted the severity of deportation, citing *Lennon* v. *INS,* and thus stated that it is "settled doctrine, that deportation statutes, if ambiguous, must be construed in favor of the alien."[43] Because of the ambiguity of that statutory provision, the Court held that such discretionary relief is available to those who meet the 7-year "lawful unrelinquished domicile" requirement.

An ever-increasing awareness of the severity and penal character of deportation has resulted in courts going to great lengths in interpreting statutory language to avoid the dire consequences of deportation wherever possible. The courts, however, have considered themselves to be hamstrung by the early decisions stating that deportation is not punishment and must therefore be considered a civil proceeding. Viewed from the standpoint of the person deported, deportation must be considered to be a form of punishment.

The preceding cases illustrate that, at least for resident aliens or long-time residents of the United States, deportation is a very severe punishment. Yet, the alien is effectively deprived of full constitutional protections simply by the courts' denial that deportation is punishment and is thus a "mere civil proceeding."

Recent judicial decisions suggest that, in certain areas of due process, the courts are willing to ignore the civil-criminal characterization question and look at the nature of the penalty inflicted. For example, decisions of the Supreme Court have extended the right to counsel beyond the narrow definition of criminal proceedings[44] and have made it clear that the question of whether assistance of counsel is required cannot be answered by the characterization of a proceeding as civil or criminal. In deportation, too, the label attached to the proceedings should not obscure the drastic consequences of deportation for individuals and for their families, who must remain behind or abandon their own country, or deny that the real issue is whether an alien who is deported is being punished, in the common meaning of the word, for violating a provision of the immigration laws.

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[36] 333 U.S. 6 (1947).

[37] *Id.* at 10.

[38] 544 F.2d 71 (2d Cir. 1976).

[39] 527 F.2d 187 (2d Cir. 1975).

[40] *Id.* at 193.

[41] 548 F.2d 37 (2d Cir. 1977).

[42] 8 U.S.C. §1182(c) (1976) provides:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

[43] 548 F.2d at 39.

Right to Counsel

Courts have repeatedly recognized the importance of counsel as a shield against an individual's loss of personal, constitutional, and statutory rights. Yet, for the thousands who are ejected from this country every year, this protection is substantially absent.

The Immigration and Nationality Act provides:

> In any *exclusion or deportation proceedings* before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose. [emphasis added][45]

However, the statement in the basic statute that the right to counsel exists in exclusion or deportation proceedings has been read very narrowly by the INS, with resulting confusion about representation during the period surrounding apprehension and "processing" of an alien.

The INS, in commenting on this chapter, stated:

> The report also speaks of a denial of right to counsel by Service practices, and confusion as to when such rights attaches. As noted in the report, 8 CFR 287.3 as amended makes clear that after the examining officer has determined that formal proceedings will be instituted against the alien, an alien arrested without warrant shall be advised of the reason of his arrest and of his right to be represented by counsel of his own choice, at no expense to the Government. Such alien is also provided, at this time, with a list of the available free legal services programs qualified under Part 292a of 8 CFR located in the district where his deportation hearing will be held. Both of these provisions go beyond what is required by the statute and the Constitution.[46]

The Immigration and Nationality Act provides that persons have the privilege of legal representation only when they are placed under formal deportation (as well as exclusion) proceedings.[47] The advisement of the availability of free legal services programs to provide counsel to arrested persons is also limited to the situation where persons are placed under formal proceedings.[48] Only a small number of arrested persons actually receive a deportation hearing. As noted in the report, many arrested persons elect voluntary departure without an opportunity to consult with counsel. Testimony received by the Commission, but denied by INS, alleged that in some instances arrested persons were told that voluntary departure would not be available to them if they chose to proceed with a deportation hearing.[49] Those who elect voluntary departure are potentially waiving their eligibility under the immigration laws for relief from deportation that would entitle them to remain in this country lawfully. Although deportation is among the most severe punishments that can be imposed,[50] persons subject to the deportation process receive the right to counsel only after the institution of formal deportation proceedings. On the other hand, defendants in criminal cases have the right to counsel at all critical stages of the proceedings.

In the criminal justice system, the right to counsel is deemed fundamental.[51] Thus, the Supreme Court has held, on numerous occasions, that effective assistance of counsel must be available at all critical stages of the proceedings.[52]

In *Miranda* v. *Arizona*, [53] the Supreme Court recognized the crucial potential for coercion and intimidation that was present in the interrogation of a person in custody:

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[44] In re Gault, 387 U.S. 1 (1966) (civil commitment of a juvenile); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (revocation of probation).

[45] 8 U.S.C. 1362 (1976).

[46] Castillo Letter. In light of the severe consequences of the penalty of deportation, it is the view of this Commission that the right to counsel should be available at all critical stages of the deportation process rather than solely at formal deportation proceedings.

[47] 8 U.S.C. §1362 (1976).

[48] 44 Fed. Reg. 4651 (1979) (to be codified in 8 C.F.R.).

[49] See "Right to Impartial Hearing" section of this chapter of the report.

[50] See "Deportation as a Civil Proceeding" section of this chapter of the report.

[51] *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

[52] *See* Powell v. Alabama, 287 U.S. 45 (1932); Hamilton v. Alabama, 368 U.S. 52 (1961); Miranda v. Arizona, 384 U.S. 436 (1966); U.S. v. Wade, 388 U.S. 218 (1967); Coleman v. Alabama, 399 U.S. 1 (1970).

[53] 384 U.S. 436 (1966).

> We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of a crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.[54]

The Court, while requiring that suspects be advised of their rights before interrogation, also declared the right of suspects to have counsel present at the interrogation.

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. . . .A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by interrogators is not alone sufficient to accomplish that end.[55]

Effective assistance of counsel is similarly important for a person facing deportation, for the time between the initial encounter with an immigration agent and the deportation hearing is often precisely the time when the accused is most helpless and vulnerable to improper pressures. During field investigations and preliminary investigations at INS facilities, conditions are ripe for overzealousness.[56]

Many people are convinced that the denial of right to counsel remains a serious problem, and the Commission has received allegations of INS excesses during factory raids pertaining to the right to counsel. One witness stressed how INS interrogations during raids were designed to eliminate any outside assistance to the alien, even from attorneys.

> [T]his is all done in an extreme custodial situation, without the person being apprised of their rights or without the person having any understanding of what the implications are, *without an opportunity to see and consult a lawyer,* a friend, family. [S]o the situation is one inherently set up so that persons, whether or not they have papers or are not going to talk to INS, are going ultimately to answer the sorts of questions which will result in their deportation. [emphasis added][57]

Another witness pointed out the need to clarify the point at which a person in custody is entitled to have counsel:

> I think one other problem that has to be alluded to in this entire process is the fact that it is very unclear at what point in this process that has been described to you—both the interrogation that takes place at the factory and also if people are then moved down to the Immigration Service, a further interrogation or what is called by the INS as processing. . .at what point are people informed that they have a right to counsel.
>
> It is unclear at what point they are advised that anything they say may be used against them in subsequent hearings, and thirdly, it is unclear at what point they can in fact be given access to counsel—namely, at what point, if there is an attorney out there who is waiting to see the person, and let us say the person is now down in the detention center of INS, it is unclear at what

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[54] *Id.* at 467.

[55] *Id.* at 469–70.

[56] For example in Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977), after 4 hours of interrogation, late in the night, petitioner signed a statement in Spanish admitting her illegal presence in this country. The facts surrounding the incident supported her contention that the statement was the product of psychological coercion, intimidation, and misrepresentation of facts by the INS interrogators.

Petitioner was approached from behind at approximately 10 p.m., as she was about to enter her apartment. Without addressing her by name, a man identified himself as an INS agent. The agent requested identification, which she said was inside her apartment. Extremely frightened by this late-night approach and convinced that she had no choice but to cooperate, she opened her door and was followed in by two INS agents. She was questioned for approximately 1-1/2 hours and then taken to the INS office, where she was questioned further until 2 a.m. One agent told her that she must leave the country in 2 weeks. When she protested that she needed more time, the agent reiterated that she must leave in 2 weeks; he characterized the offer as a fair deal for her. Throughout this interrogation session, the agent insisted that she had no other choices but to accept the 2-week departure deadline. Fearing that she would not be permitted to go home until she cooperated, she signed the statement, which admitted that she was illegally in this country. Although the printed form that she signed said that her statement must be freely and voluntarily given, could be used against her in subsequent proceedings, and listed other rights afforded her, she claimed that this was never read or explained to her, including her right to a deportation hearing. She was led to believe that the best deal available to her was the agent's offer to delay her departure by 2 weeks. *Id.* at 805. In Bong Youn Choy v. Barber, 279 F.2d 642 (9th Cir., 1960), the petitioner was interrogated for 7 hours, ending in the early hours of the morning, where he was told that if he did not make a statement that was in conformity with accusations against him, he would be prosecuted for perjury or deported within 3 weeks. After the interrogation, petitioner could not sleep and early the next morning complied with the interrogator's wishes. Petitioner challenged the admissibility of the statement, and the court concluded that the involuntary statement could not be used because it violated an essential element of due process.

[57] Mark Rosenbaum, attorney, ACLU, testimony before the California Advisory Committee to the U.S. Commission on Civil Rights, open meeting, Los Angeles, June 15–16, 1978, p. 337 (hereafter cited as Los Angeles Open Meeting Transcript).

> point they are entitled to see that lawyer, and I think that presents some real problems and somehow needs to be addressed.[58]

In the Los Angeles district of the INS, agents are instructed to complete a form I-213, "Record of Deportable Alien," before allowing an alien to contact his or her attorney.

> In any case where the alien desires an attorney the Form I-213 will be completed as set forth in the above paragraph. *No additional questions relating to deportability or criminal activity will be directed to him without the attorney's consent or presence.* The alien will be allowed to contact his attorney upon completion of the Form I-213. [emphasis in original][59]

The directive given in the Los Angeles district may also be policy in other areas, as illustrated by the testimony of a Texas attorney:

> They took 213s [record of deportable alien] from them and ironically they told them they had a right to an attorney. And when they said, "Our attorneys are right outside the door; we can see them through the little small holes in the door there. We want to talk to him," they said, "No, we'll let them talk to you after we take your statement."[60]

Assistance that counsel may be able to provide after a person has been "processed," however, may be only illusory where that processing extracts sufficient information to make a deportation hearing a mere formality. The damaging effect that the processing may have for the person interrogated is made clear by instructions given by the Los Angeles district director:

> In the field, if the person admits alienage and facts establishing unlawful presence in the United States, the interrogating officer should if at all possible, execute Form SW-424 on the spot. . . .The Form SW-424 properly completed *will establish deportability.* Consequently, if the alien states he wants an attorney and/or declines to answer questions upon being given the *Miranda* warning, the information from the Form SW-424 will be utilized to *record data as to alienage and time, place and manner of entry* on the Form I-213 [record of deportable alien]. [emphasis added][61]

It should also be noted that the elements of time, place, and manner of entry are the precise elements required to convict an alien of the criminal offense of illegal entry.[62]

That many legal rights were endangered by the processing stage of immigration law enforcement was recognized in 1931 by the Wickersham Commission:

> One of the most striking features of the entire procedure is the lack of counsel for the suspects. No attorneys are allowed in the preliminary examinations, and even at the warrant hearings the persons with whom the processes of deportation laws are apt to come into contact generally have no funds with which to procure lawyers. In the great majority of cases, suspects have no one at any stage of the proceedings to protect their rights. . . .In the first part of this report examples have been given of the many cases in which, when attorneys were present, they were able to establish additional facts or the proper construction and application of the laws and thereby prevent deportation which would otherwise have been effected. In all probability a great many unrepresented persons have been deported whom lawyers could have saved.[63]

One measure recommended by the Wickersham Commission to help alleviate the problems it saw was to have suspects informed of the availability of free legal services provided by charitable organizations. Nearly 50 years later, this recommendation was implemented by the INS. A new regulation now provides that:

> aliens under exclusion and deportation proceedings must be advised of the availability of free legal services programs, and organizations recognized pursuant to 8 C.F.R. 292.2. . . .These final rules are necessary and intended to establish procedures for informing aliens of the availability of free legal services programs in order to afford them full opportunity to obtain legal representation when involved in deporta-

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[58] Peter Schey, attorney, Legal Services Alien Rights Programs, testimony, Los Angeles Open Meeting Transcript, pp. 344–45.

[59] Los Angeles District Director, INS, memorandum to Investigations Unit, Feb. 10, 1978.

[60] Laurier McDonald, testimony before the Texas Advisory Committee to the U.S. Commission on Civil Rights, open meeting, San Antonio, Sept. 12–14, 1978, p. 30 (hereafter cited as Texas Open Meeting Transcript).

[61] Los Angeles District Director, INS, memorandum, to Investigation Unit, Feb. 10, 1978.

[62] 8 U.S.C. §1325 (1976).

[63] National Commission on Law Observance and Enforcement (Wickersham Commission), *Report on the Enforcement of the Deportation Laws in the United States* (1931), pp. 143–44.

> tion or exclusion proceedings before this Service.[64]

Significantly, even this measure was adopted by INS only after lawsuits were instituted challenging the unavailability of legal counsel in the deportation process.[65]

This new provision for informing aliens of the availability of legal services, however, does nothing to eliminate the greatest difficulties in the system. By its terms, the regulation still applies only to those who are placed under formal deportation proceedings, a token number of those apprehended. When asked how many people this new regulation would affect, Chief Immigration Judge Herman Bookford[66] replied, "Well, the last figures that I saw were that 800,000 people were given voluntary departure without hearing. We had 60,000 hearings last year."[67] The urgency for meaningful reform in the due process rights of aliens is highlighted by figure 7.1, which illustrates the comparatively small percentage of people who will benefit from the new regulation.

Right to Bail

Today, with the eighth amendment to the Constitution creating an implicit right to bail,[68] and various statutes creating an explicit right to bail,[69] this right is not often subject to dispute.[70] Questions concerning bail have generally revolved around its administration and standards for granting bail, with the criminal justice system struggling to devise an equitable and just answer to such questions, as seen in the Bail Reform Act of 1966. The quasi-criminal bail system administered under the Immigration and Nationality Act (INA),[71] with no comparable reform, lags behind the criminal justice system.

Bail in criminal cases is meant "to procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the court."[72] Bail as administered by INS is analogous to bail in criminal cases and should provide the safeguards instituted in the criminal law arena through the Bail Reform Act.[73]

The Bail Reform Act provides:

> Any person charged with an offense other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. . . .[74]

Under this provision of the Bail Reform Act, a person has a right to release on his or her own recognizance or upon execution of a bond, unless the judicial officer determines that such release will not ensure the person's appearance. Bail is not to be used for any purpose other than to secure the appearance of the accused, and the burden is on the Government, should it want to detain the accused, to establish that he or she is likely to abscond.

The Immigration and Nationality Act provides:

> Any. . .alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability.[75]

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[64] 44 Fed. Reg. 4651 (1979).

[65] Munoz v. Bell, No. CV-77-3765-WP, District Court, Central District of California. That case was later dismissed with the consent of both parties. Munoz v. Bell, No. CV-77-3765-WP (C.D. Cal. Oct. 4, 1979) (order entered).

[66] Mr. Bookford retired from the Service in September 1979. He was the Chief Immigration Judge from August 1976 until his retirement.

[67] Bookford Testimony, Washington Hearing Transcript, p. 275.

[68] The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

[69] See, for example, the Bail Reform Act of 1966, 18 U.S.C. §§3141-3151 (1976).

[70] This right in immigration cases was challenged in one notable exception, Carlson v. Landon, 342 U.S. 524 (1951). This case arose out of the general "Red scare" of the 1950s. It involved alleged members of the Communist Party who were also aliens. These people were arrested without warrants and held without bond. They appealed the refusal to set bond. The Supreme Court held that "the Attorney General may, in his discretion, hold in custody without bail, pending determination as to their deportability, aliens who are members of the Communist Party of the United States, when there is reasonable cause to believe that their release on bail would endanger the safety and welfare of the United States."

[71] 8 U.S.C. §1252(a) (1976).

[72] Black's Law Dictionary 177 (rev. 4th ed. 1968).

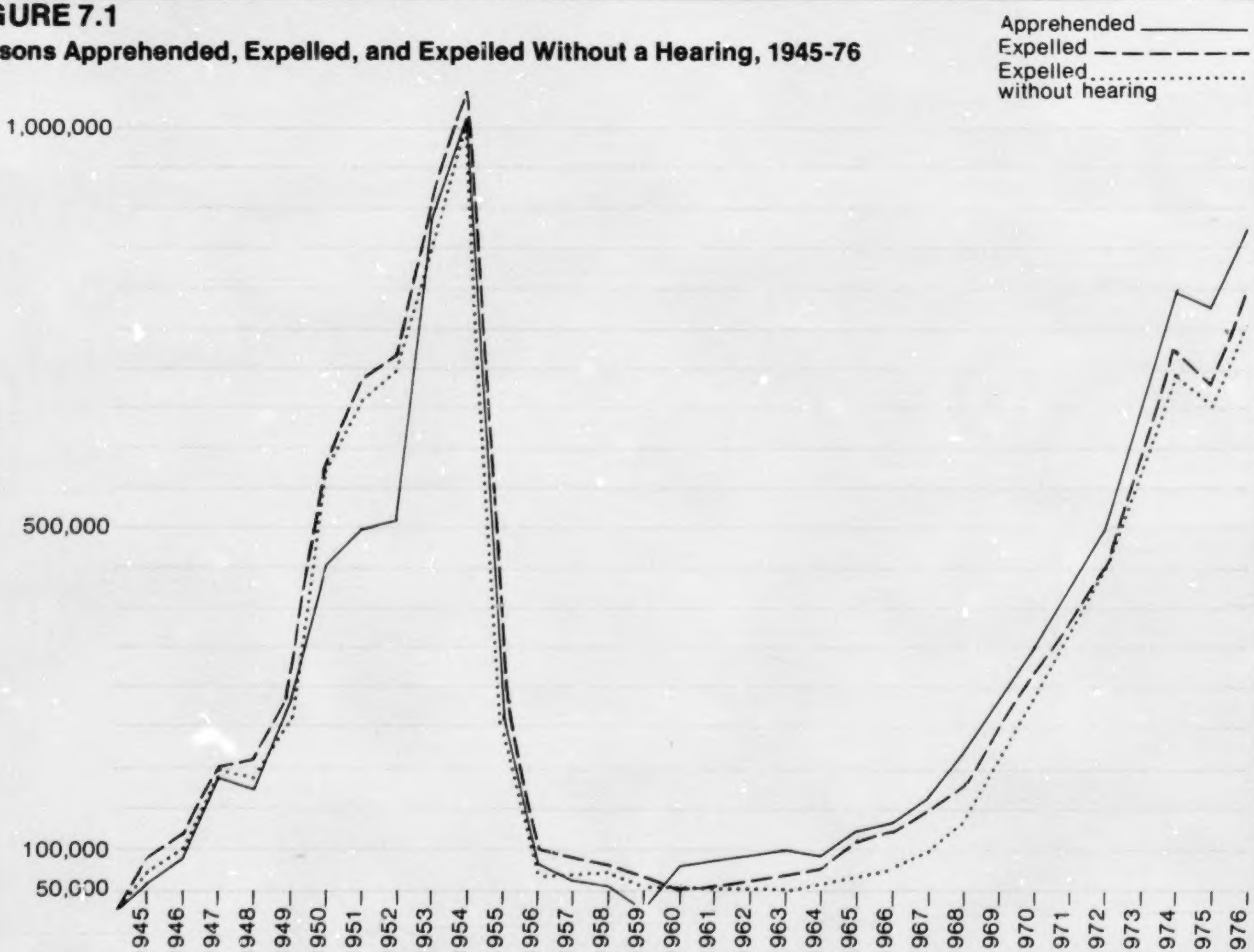
[73] Bail Reform Act of 1966, 18 U.S.C. §§3141-3151.

[74] *Id.* at §3146(a).

[75] 8 U.S.C. §1252(a) (1976).

FIGURE 7.1

Persons Apprehended, Expelled, and Expelled Without a Hearing, 1945-76



*Note: The recordkeeping on apprehensions changed in 1960. Figures before 1960 represent the total actually apprehended. Since 1960 figures include those located.

Source: U.S., Department of Justice, Immigration and Naturalization Service, *1976 Annual Report*, p. 126, extracted from Table 23.

This exercise of discretion is subject to a very limited review in the Federal courts. The INA provides that the court, in a habeas corpus proceeding, can only assess whether "the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability."[76] Under this standard, a determination regarding bail will "be overturned only on a showing of clear abuse."[77]

Under this section, then, an alien may or may not be granted bail solely through the discretion of the Attorney General and may be returned to custody solely through the Attorney General's discretion. The only statutory check on the Attorney General's discretion is the nebulous "reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability." The rules promulgated in the Code of Federal Regulations[78] provide few additional safeguards.

The INS Operations Instructions give the grounds justifying detention, namely:

> [w]hen any available information indicates that an alien's freedom at large would clearly represent a present danger to public safety or security, or when the alien's lack of funds or fixed address supports a finding that he is likely to abscond.[79]

The lack of guidelines for release and conditions of release leave room for arbitrary and unequal treatment. Allegations have been made that the lack of guidelines does lead to capricious action on bail and parole requests. One witness commented:

> The immigrant is treated as a common criminal; he is fingerprinted, photographed, and jailed. Usually he is either deported or given a high bond. The bond is inconsistent. People with exactly identical cases are given different amounts of bonds. . . .[80]

It was also alleged by Austin Fragomen that bail was administered in a discriminatory fashion:

> If an Englishman is arrested by the Immigration Service, you can almost be assured that he will be released on his own recognizance. If the individual arrested were Asian or were Hispanic, there would be a minimum of a $2,500 bond requested notwithstanding the fact that in most cases the European person can more easily post a higher bond, and the bond that's required of an Asian or Hispanic is totally unrelated to his ability to pay. . . . *They just routinely require standard amounts for persons of certain ethnic origin with total disregard of the situation* [emphasis added].[81]

The INS, however, disputed the testimony of Professor Fragomen, former staff counsel to the Immigration, Citizenship, and International Law Subcommittee of the House Judiciary Committee, and denied "that bail is administered by the INS in a discriminatory fashion and that the Service, '. . .just routinely require[s] standard amounts for persons of certain ethnic backgrounds with total disregard of the situation'."[82]

A study recently commissioned by INS provides some support for criticism that the INS bail process is not applied in a uniform manner. This report compared the bond-setting practices of INS with those of the criminal courts. Starting from the premise that the function of bail should be solely to assure the appearance of the accused at a proceeding, the report identified certain inequities in the INS system:[83]

> - There is no discernible pattern—Service-wide—to the setting of bond.
>
> - There are few statistics—present or past—that demonstrate, even on a "hunch" basis, that one amount of bond is more or less successful than another.

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[76] *Id.*

[77] Carlson v. Landon, 342 U.S. 524, 540 (1952). See also Yaris v. Esperdy, 202 F.2d 109, 112 (2d Cir. 1953); Hyndman v. Holton, 205 F.2d 228, 230 (7th Cir. 1953).

[78] 8 C.F.R. §242.2 (1978) provides that the alien "shall also be informed whether he is to be continued in custody, or, if release from custody has been authorized, of the amount and conditions of the bond or the conditions under which he may be released." The procedure for review is also outlined.

8 C.F.R. §287.3 (1978) applies to those "aliens" arrested without a warrant and provides that the "alien" shall be advised "that a decision will be made within 24 hours or less as to whether he will be continued in custody or released on bond or recognizance." After this stage, if a decision has been made to institute proceedings, 8 C.F.R. §242 applies.

[79] Operations Instruction 242.6c.

[80] Douglas Franklin, National Alliance on Immigration Laws, testimony before the New York State Advisory Committee to the U.S. Commission on Civil Rights, open meeting, New York City, Feb. 16–17, 1978, p. 55 (hereafter cited as New York Open Meeting Transcript).

[81] Austin Fragomen, professor of law, New York University and Brooklyn Schools of Law, testimony, New York Open Meeting Transcript, pp. 245–46.

[82] Castillo Letter.

[83] INS, "A Comparison of the Bond-Setting Practices of the Immigration and Naturalization Service with that of the Criminal Courts" (Bruce D. Beaudin, consultant) (July 26, 1978), pp. 20–31 (hereafter cited as Bond Study).

- Although "lip service" is given to the principle that bond is set to assure appearance, in reality it is set (or not set) for other purposes as well. [The report specified such "other purposes" as punishment for lying, attempting to elude detection, using false documentation, etc.]

- There are few written standards against which bond recommendations should be measured.

- Files do not generally contain sufficient information to justify the bond recommended (or the bond set or reduced at bond redetermination hearings).

- Since most bond redetermination requests result in reduced bonds (most of the hearings attended resulted in bond reductions), the initial bond may be set at too high a figure.

- Since comparatively few bond reduction requests are made, it follows that most persons detained are held in lieu of bonds that would probably be reduced if such requests were made.

- There is scant use of detention without bond in cases where there is substantial evidence of an intent to flee.

To correct these inequities, the report urged that:[84]

> A. In those cases in which a determination has been made to issue an order to show cause[85] coupled with a warrant of arrest, a more thorough community tie investigation than is presently carried out should be considered.
>
> B. An objective system for determining appropriate release recommendations should be designed and implemented.
>
> C. A system that provides for the immediate presentment of a detained alien to a special inquiry officer (either an immigration judge or some type of non-Service magistrate) for initial bond determination and advice about various rights should be implemented.
>
> D. In those cases in which a respondent is detained longer than forty-eight (48) hours, an automatic bond redetermination process should be considered.
>
> E. Experimental programs should be carefully designed and monitored to test the feasibility of reasonable alternative modes of release.
>
> F. A temporary (spot check) system of data analysis should be implemented to determine the true effects of either the present bond practices or any experimental program conducted.

In general, the report found that the bail system was misused, not due to malicious intent, but rather from a lack of consistency and accountability. The lack of consistency and comparability in INS bail decisions stemmed in part from the lack of coordination between the prosecutorial and adjudicative functions of INS. The report found that the two groups worked at odds:

> investigators recommend bonds higher than they think necessary because they "know" the judges will reduce them if a redetermination is requested. At the same time, judges will reduce bond based not so much on the individual merits of a particular case but because they "know" the law enforcement side of the Service asks for high bond anticipating that they will reduce it.[86]

Bail as utilized by INS is analogous to bail in the criminal sphere. To protect against unconstitutional deprivations of liberty that can occur from erroneous or improper bond determinations, the setting of bail by INS should, therefore, be administered as carefully as in criminal cases.

Right to Impartial Hearing

The right to a hearing is perhaps the most firmly established requirement of due process, but controversy has always raged as to what a hearing should entail. It is generally accepted that the right to a hearing is principally the right to be heard by an impartial person or judge.

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[84] Ibid., p. 32.

[85] An order to show cause issued and served on the detainee by the INS is required for the commencement of every deportation proceeding:

> The order to show cause will contain a statement of the nature of the proceeding, the legal authority under which the proceeding is conducted, a concise statement of factual allegations informing the respondent of the act or conduct alleged to be in violation of the law, and a designation of the charges against the respondent and of the statutory provisions alleged to have been violated. The order will require the respondent to show cause why he should not be deported. The order will call upon the respondent to appear before an immigration judge for a hearing at a time and place which may be stated in the order or may be later specificed. Respondent shall be notified of the time and place of the hearing not less than 7 days before the hearing date except that where the issuing officer, in his discretion, believes that the public interest, safety, or security so requires, he may schedule the hearing on shorter notice.

8 C.F.R. §242.1(b) (1980).

[86] Bond Study, pp. 18–19.

Prior to 1952 the Immigration and Nationality Act did not expressly require that an alien be given a hearing before deportation from the United States.[87] The Supreme Court, however, held that the right to a hearing was implicitly required by the deportation statute because "the constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body."[88] Other Supreme Court cases recognized the severe consequences of deportation and acknowledged that the right to a hearing accrues to persons who are accused of violating the immigration laws. As the Court stated in the *Japanese Immigration Case:*

> [T]his Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that *no person shall be deprived of his liberty without opportunity, at some time, to be heard,* before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent. . .arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. *No such arbitrary power can exist where the principles involved in due process of law are recognized* [emphasis added].[89]

Further development of judicial doctrine concerning aliens' rights to a hearing resulted in a requirement that such hearings be held before an impartial judge. In 1950 the Supreme Court held in *Wong Yang Sung:*

> When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least *currently prevailing standards of impartiality.* A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself [emphasis added].[90]

Although the definition of "currently prevailing standards of impartiality" may vary from generation to generation, it is clear that an impartial hearing is mandated by the Constitution. In deciding *Wong Yang Sung,* the Court considered a 1937 report by the President's Committee on Administrative Management. The Committee found that agencies charged with law enforcement functions as well as judicial responsibilities could not conduct sufficiently impartial hearings to protect the rights of individuals who appeared before them:

> the independent commission is obliged to carry on judicial functions under conditions which threaten the impartial performance of that judicial work. The discretionary work of the administrator is merged with that of the judge. *Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights.* But the mixed duties of the commissions render escape from these subversive influences impossible.
>
> Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission,

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[87] Immigration Act of 1917, 39 Stat. 874 §19(a), as amended (repealed 1952). Section 19(a) provided in part:

> any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States. . .shall, upon the warrant of the Attorney General, be taken into custody and deported. . . .In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final. . . .

[88] Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950).

[89] 189 U.S. 86, 100-01 (1902). *See also* Bridges v. Wixon, 326 U.S. 135, 160-162 (1945) (Murphy, J., concurring).

[90] 339 U.S. at 50 (1950).

> in the role of prosecutor, presented to itself. [emphasis added][91]

Similarly, and as early as 1931, the Wickersham Commission found that, in deportation cases as in other judicial proceedings, an independent hearing officer or judge was necessary to ensure a person's constitutional right to an impartial hearing. The Wickersham Commission concluded that a judicial body must be completely separate from, and not responsible to, the agency charged with enforcing the laws:

> It is equally important that this body should not be appointed by and function under the jurisdiction of the governmental department responsible for the investigation and prosecution of the cases which the judging body is to decide. This body should have an unfettered opportunity to review the prior processes of the cases which come before it to see if all the facts have been properly developed and if due process of law has been observed; it should not be answerable for its decisions to the department charged with the enforcement of the deportation laws.[92]

In partial response to these judicial decisions and committee reports, Congress in 1952 amended the immigration laws to provide each person with a hearing before an impartial officer prior to deportation.[93] The current structure and operating procedures of INS, however, effectively deny the right to an impartial hearing to many persons it apprehends. The Immigration and Nationality Act provides that otherwise deportable aliens may elect to depart voluntarily from the United States rather than undergo a deportation hearing:

> In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable. . .if such alien voluntarily departs from the United States at his own expense, or if removed at Government expense. . . .[94]

The right to a hearing can, therefore, be discarded if an individual admits to being deportable and agrees to depart voluntarily, which may be accomplished in a matter of hours, without opportunity to contact counsel or family. By agreeing to voluntary departure, however, persons not only forfeit their right to a hearing, but may also lose remedies to which they are statutorily entitled. Many forms of discretionary relief, for example, can be applied for at hearings, which may afford persons their sole opportunity to establish eligibility for these forms of relief. Although electing to depart voluntarily may benefit detainees by facilitating a later reentry into the United States, the seductiveness of that offer may also cause them unknowingly to waive potential forms of relief and the right to a hearing.

It appears, however, that INS officials are making such offers of voluntary departure coupled with warnings about the risks of deportation hearings. Joseph Sureck, then INS District Director for Los Angeles, when asked whether INS tried to communicate to a person that leaving voluntarily was more desirable than going through a deportation hearing, responded:

> we may explain to him, and I can't tell if this comes up every time, but it is quite likely that when we tell him about going to deportation hearing, that if the immigration judge finds him deportable, although he can grant him voluntary departure again, but if he doesn't, that he needs permission from the Attorney General to reapply before he can come back again, and if he comes back again under a deportation order, then it could subject him to a criminal penalty.[95]

Because it is evident that INS has an interest in having people depart voluntarily rather than undergo a hearing, it is questionable whether INS officers should be persuading people to depart voluntarily, particularly when these officers are part of the enforcement arm of the agency and, as such, they aid in the prosecution of persons under the immigration laws. Even the most well-intentioned officers would find it difficult to avoid having their suggestions seem coercive when acting under color of law, and this is heightened by the intimidating surroundings.

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[91] *Id.* at 41–42; U.S., President's Committee on Administrative Management, *Administrative Management in the Government of the United States* (1937), pp. 36–37.

[92] Wickersham Commission, *Report on the Enforcement of the Deportation Laws of the United States,* p. 158.

[93] Immigration and Nationality Act of 1952, 8 U.S.C. §1252(b) (1976). Subsection (b) provides in part:

> (b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present. . . .

[94] Immigration and Nationality Act of 1952, §242(b), 8 U.S.C. §1252(b).

[95] Joseph Sureck, testimony, Los Angeles Open Meeting Transcript, p. 576.

Lastly, to the extent that the statute does not check possible "overpersuasiveness," it does not adequately protect the rights of people from governmental abuse. Although INS officials, as did District Director Sureck in the previous paragraph, characterize these situations as attempts by INS officers to "explain" the deportation process and its options to arrested persons, allegations of intimidation were made by witnesses before the Commission:

> I know cases where they were told that if they didn't accept voluntary departure and went for a hearing, they would not get voluntary departure at the hearing. Now, there is no way an officer can make that determination. . . .And yet, many times, they are scared into signing this form, because they were told that they would never be able to depart voluntarily, and a deportation does correctly have a negative effect on any possible immigration in the future.[96]

Whether threats are made or not, the Immigration and Nationality Act does not provide a deterrent to the possibility of intimidation. Such a deterrent would have to ensure that voluntary departure could only be accepted (and a deportation hearing thereby forfeited) where there was a knowing and intelligent waiver by a person who had been fully informed of his or her rights.[97] Even this protection would not be adequate, however, where certain forms of discretionary relief cannot be obtained without a hearing and a person's eligibility for such relief cannot be determined before a hearing. The Service's practice of urging people to accept voluntary departure, then, might well deny such persons their constitutional right to a hearing before deportation from the United States.

Unfortunately, even for those who avoid the pitfalls of ill-advised voluntary departure and insist upon their "day in court," their constitutional rights are still not secure. The courts have held that due process mandates a hearing before an impartial tribunal. The Immigration and Nationality Act also implies the right to an impartial hearing by providing that:

> No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions.[98]

The structure of INS, however, conflicts with this attempt to secure impartiality. Although the immigration judge is in theory responsible only to the Commissioner, in practice, the judge is subject to the budgetary and administrative control of the district director, the chief enforcement officer at INS local offices. It is solely up to the district director to supply the immigration judge with office supplies and support staff. Judge Herman Bookford, Chief Immigration Judge of INS, discussed the dependence that immigration judges have on the district directors:

> The allocation of resources, including funds for clerical personnel, for courtroom facilities, for mechanical equipment, all phases of administrative support are allocated to the district directors, and it is up to the district director to decide how much of that he wants to allocate to the immigration judge.[99]

The control exercised by a district director over the immigration judge is not necessarily malicious. The primary responsibility of district directors is to enforce the immigration laws and prosecute offenders, and it is understandable that they would allocate budgetary resources based on their perceptions of the INS activities that should be given priority.

As Judge Bookford testified, immigration judges and district directors have differing priorities concerning the processing of deportation cases. The reasons for those differences are:

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[96] Barbara Honig, director, Immigration Law Clinic, testimony, Los Angeles Open Meeting Transcript, p. 186.

[97] The INS asserts that:

> Practically speaking, many such aliens do not want hearings for the simple reason that upon apprehension, they would be placed in detention pending their deportation hearing. In many cases the alien is aware that he is clearly deportable having surreptitiously crossed the border or overstayed a nonimmigrant visa. In most of these instances, the alien would rather voluntarily return to his native country, attempt to gain employment there, and be with his family than wait in a detention facility for a hearing where the likelihood is that he would receive the same relief, voluntary departure, from an Immigration Judge. The Service does not condone any type of coercion upon aliens by our officers in this respect; the reality is that most aliens know what their rights are and voluntarily depart because they know that they are clearly deportable.

Castillo Letter.

The Commission disagrees with the assertion that "the reality is that most aliens know what their rights are." The likelihood is small that most aliens have a complete understanding of the system of American law, particularly the intricacies and complexities of immigration law. We believe that few aliens would have a knowledge of American immigration law and their eligibility for various forms of relief from deportation that would entitle them to remain in this country lawfully. Taking notice of the fact that aliens often have little or no English-language facility, it is even more unlikely that "most aliens know what their rights are."

[98] Immigration and Nationality Act of 1952, §242(b), 8 U.S.C. §1252(b).

[99] Bookford Testimony, Washington Hearing Transcript, pp. 263-64.

> First of all, the district director is a law enforcement officer, and as such, when he institutes proceedings against an alien, he is interested in seeing that it is carried through to a successful conclusion; otherwise he would not have instituted the proceeding in the beginning. The immigration judge, on the other hand, takes no stand either way, either for the Service or for the alien.
>
> Secondly, the priorities arise because the district director has no responsibility for the immigration judge's activity. If the immigration judge's activity is very successful, the district director gets no credit. If it is unsuccessful, if it is very poor, he gets no blame. So on the other hand, if his investigative staff does a poor job, he gets blamed for that. If his adjudicators fall behind, he will get complaints from Members of Congress and from members of the public.[100]

As a result of these different priorities, and the lack of sufficient administrative support, deportation cases are backlogged for periods ranging from 3 months to 2 years.[101] Judge Bookford concluded that a separate and independent immigration court is necessary to assure all persons of a timely and impartial hearing and to promote public recognition that the judges are, in fact, impartial.

> I think it is very much advisable, not only from the standpoint of carrying out the work efficiently, but from the standpoint of a public view of the operation. We must not only be independent but we must, I think, give the appearance of independence. We must convince the aliens, the public, the members of the bar that our decisions are independent, and when we are so closely allied with and a part of the Immigration Service, it's very difficult to convince these people that we are indeed independent. . . .[102]

Creation of an independent adjudicative body separated from the enforcement agency was recommended by the Wickersham Commission in 1931,[103] and a similar proposal is currently supported by the immigration judges. An administratively and judicially independent court would assure all persons that their rights will be adequately protected and impartially adjudicated without fear of coercion or prejudice.

Administrative Arrest Warrants

INS has been given broad powers to take into custody people charged with violating the immigration laws. Arrests can be made with or without a warrant, depending on the circumstances, but even where a warrant is required,[104] it is not difficult to obtain.

The INS administrative arrest warrant procedure raises two specific problems regarding procedural safeguards. First, there is no requirement that the warrant be issued by a neutral judicial officer. The INS not only prosecutes immigration law violations, but it is also entrusted with issuing warrants.[105] Secondly, the standard upon which a warrant may be issued falls far short of the constitutional requirement of probable cause.

Although in the criminal justice system the necessity of an independent and neutral appraisal of the evidence supporting an application for a warrant has been recognized, the Immigration and Nationality Act has no similar provision. The act makes no pretense at requiring any degree of impartiality in the consideration of arrest warrants. Even the Assistant District Director for Investigations, who is responsible for the preparation of a case and the filing of charges against an alien, is one of the officials empowered to issue warrants.

Dissenting in a case involving this issue, Justice William J. Brennan compared criminal and INS administrative arrest warrants and commented on the need for greater administrative safeguards:

> Here the arrest, while had on what is called a warrant, was made totally *without the intervention of an independent magistrate;* it was made on the authorization of one administrative official to another. And after the [person] was taken into custody, there was no obligation upon the

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[100] Ibid., p. 264.

[101] Ibid.

[102] Ibid., p. 265.

[103] Wickersham Commission, *Report on the Enforcement of the Deportation Laws of the United States,* pp. 177–79.

[104] 8 U.S.C. 1357(a)(2). A warrant is not required in two situations: (1) when an alien in the presence of an INS official is entering or attempting to enter the United States illegally, or (2) when an alien is believed to be in the United States in violation of law and the officer has reason to believe that the alien is likely to escape. In the absence of these two circumstances, the INS must use a warrant to make an arrest.

[105] 8 C.F.R. §242.2(a) (1978) provides, "the respondent may be arrested and taken into custody under the authority of a warrant of arrest. However, such a warrant may be issued by no one other than a district director, acting district director, deputy district director, assistant district director for investigations, or officers in charge of an office enumerated in §242.1(a) [listing offices] and then only whenever, *in his discretion, it appears that the arrest of the respondent is necessary or desirable.*" This warrant may be issued at "the commencement of any proceeding. . .or at any time thereafter." (emphasis added)

> administrative officials who arrested him to take him before any independent officer, sitting under the conditions of publicity that characterize our judicial institutions, and justify what had been done. [emphasis added][106]

The lack of safeguards was made more glaring by testimony that a request for an administrative arrest warrant can be made over the telephone "if they have enough information."[107] The lack of adequate provisions for evaluation of a warrant application by a neutral authority can lead to excesses.

Leon Rosen, a former immigration official who is now a private practitioner, alleged:

> [U]ntil very recently, no place was immune from INS raids—homes, places of employment, public streets. My colleagues at the immigration bar and I have known of numerous instances of warrantless entries into private homes, interrogations, arrests in clear violation of the fourth amendment to the United States Constitution. The fourth amendment, incidentally, prohibits the issuance of a warrant except upon oath or affirmation. The Immigration Service doesn't even bother with that minor technicality, for, in practice, a warrant for the arrest of an alien is issued on the mere verbal request of an investigator with no procedural safeguards whatsoever.[108]

Problems created by the absence of an impartial judge in the warrant process are exacerbated by the absence of any meaningful standard to determine when a warrant should be issued. The Immigration and Nationality Act provides that an arrest warrant may be issued "whenever, in [the named officials'] discretion, it appears that the arrest of the respondent is *necessary or desirable.*" [109] What may be deemed necessary or desirable is not defined.

Although the fourth amendment[110] requires that probable cause be the basis upon which a warrant is issued, that standard has not been applied to issuance of INS warrants. According to Mr. Rosen:

> what actually happens is, where they see fit to obtain a warrant, an investigator simply goes to his supervisor and says, "I want a warrant," and the district director signs a warrant, and nobody bothers to prepare an affidavit or read the affidavit or determine whether or not there is probable cause.[111]

As administered by INS, the warrant of arrest is more a piece of administrative paperwork than a barrier between an individual and abusive official action. INS warrant procedures are not in line with fourth amendment requirements, making the warrant process an empty gesture that lends a fallacious claim of legitimacy to a subsequent arrest.

Findings and Recommendations

Finding 7.1: The right to counsel is not provided to suspected immigration law violators at all crucial stages of the deportation process.

Notwithstanding the consequences of the penalty of deportation, aliens subject to deportation hearings receive less due process protection than defendants in criminal proceedings. Defendants in criminal cases receive substantial due process protection because of the punishment or deprivation of liberty that can occur upon conviction. Aliens subject to deportation hearings may similarly suffer from the severe consequences of deportation, which means banishment from the United States and which "may result also in loss of both property and life; or of all that makes life worth living."[112] But as a result of a long line of Supreme Court decisions in which deportation hearings have been classified as civil proceedings, aliens subject to those hearings have not been accorded the full measure of due process available in criminal proceedings.

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[106] Abel v. United States, 362 U.S. 217, 251 (1960) (Brennan, J., dissenting).

[107] Henry Wagner, former INS Assistant District Director for Investigations, New York District Office, testimony, New York Open Meeting Transcript, p. 146.

[108] Leon Rosen, testimony, New York Open Meeting Transcript, pp. 221-22.

[109] 8 C.F.R. 242.2 (1978) (emphasis supplied).

[110] The fourth amendment provides:

> The right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated, and *no Warrants shall issue, but upon probable cause,* supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [emphasis supplied]

[111] Rosen Testimony, New York Open Meeting Transcript, pp. 269-70. The INS disagreed with the testimony of Mr. Rosen, a former immigration official. It stated:

> Contrary to the allegation made by one of the witnesses who testified before the Commission, that an investigator simply goes to his supervisor and says "I want a warrant," such an investigator is required to fill out an I-265, "Application for Order to Show Cause," which requires the investigator to present evidence supporting his request for a warrant. This information must be supplied before such a warrant will be issued. Warrants can be issued only by District Directors, Deputy District Directors, Assistant District Directors for Investigations, and certain Officers in Charge. 8 CFR 242.1(a).

Castillo Letter.

We note that the INS did not address the two issues in the administrative arrest warrant section of this chapter: the absence of an impartial judge in the warrant process and the absence of a requirement of probable cause for the issuance of a warrant.

[112] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

Although recent Court decisions, recognizing the similarity between deportation and punishment, have strictly construed laws that provide the grounds for deportation, the courts have continued to label deportation hearings as civil proceedings rather than look at the consequences of an order of deportation in determining the sufficiency of due process for aliens subject to deportation proceedings. In some nonimmigration cases involving the right to counsel, the Supreme Court has looked beyond the civil-criminal characterization of the proceeding to accord parties greater due process.[113] The consequences of deportation require a similar approach for providing due process to aliens in deportation hearings.

The courts have recognized that the assistance of counsel is one of the most important guarantees for the protection of constitutional and statutory rights of individuals. Although the Immigration and Nationality Act recognizes the right to counsel, it is expressly recognized only in exclusion and deportation proceedings.

It is unclear whether there is an absolute right to counsel between the time of the initial encounter with the INS agent and the actual hearing itself.

The right to counsel is deemed fundamental in criminal proceedings and is provided at an early stage of those proceedings. The presence of legal counsel helps prevent law enforcement officers acting under color of law from coercing or intimidating persons into making incriminating statements.

Because credible evidence indicates that INS agents obtain incriminating statements from individuals immediately after detention and apprehension, the subsequent availability of legal counsel only at the hearing itself is no more than illusory compliance with the constitutional right to counsel. Moreover, the absence of counsel during the prehearing stages of the deportation process may result in apprehendees or detainees foregoing a hearing and electing voluntary departure in some cases where facts or circumstances exist that would make them eligible to remain in the United States. But because such facts were not disclosed during an INS interrogation seeking information on their deportability, detainees may unknowingly waive statutory rights for which they are eligible under the Immigration and Nationality Act.

During the deportation process, indigent persons who have been detained or apprehended for suspected violations of immigration laws may not have the assistance of legal counsel. The Immigration and Nationality Act provides for the right to counsel, but it must be at no expense to the Government. Because some detainees appeared in deportation hearings without the assistance of counsel, the 1931 Wickersham Commission report recommended that detainees be advised of free legal services provided by charitable organizations. Almost 50 years later, the INS adopted a regulation incorporating this recommendation to that effect after litigation was instituted challenging the unavailability of counsel to indigent detainees. However, this new regulation applies only to those persons placed under formal deportation (or exclusion) proceedings, which represents only a small portion of those apprehended. Approximately 60,000 hearings were held in 1978, while 800,000 persons were given "voluntary departure" without the benefit of a hearing.

Recommendation 7.1: Congress should amend the Immigration and Nationality Act to require the Immigration and Naturalization Service to notify detainees at all crucial stages of the deportation process that they have a right to legal counsel and may be entitled to free legal counsel provided by charitable and legal service organizations. Due process requires that a detainee should have the availability of the assistance of counsel not merely at the actual hearing but at the earliest possible stage of the deportation process.

Finding 7.2: Current INS policies and practices in setting bail fail to adhere to acceptable standards of due process for the following reasons:[114]

- Bail is set for purposes other than to assure the appearance of the arrested alien at the subsequent hearing.
- There is a lack of consistency and comparability in the setting of bond.
- There are few written guidelines for measuring whether the bail recommended is appropriate.
- There is a lack of sufficient documentation in case files to justify either the bond recommended or the amount of bond set at the hearing.
- Few statistics are available which might indicate what are successful (and therefore appropriate) bond amounts in a particular case.

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[113] In re Gault, 387 U.S. 1 (1966) (civil commitment of a juvenile); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (revocation of probation).

[114] INS, Bond Study, pp. 20–31.

Recommendation 7.2: The INS, to provide a more uniform and equitable bond determination process, should establish a more objective bail system that includes the following:[115]

- Written guidelines to assist in the determination of appropriate release recommendations.
- A requirement that a detained alien is to appear before an an immigration judge or a non-INS magistrate for an initial bond determination and for the advisement of his or her rights.
- More thorough investigations of the ties of the arrested person to the community in order to make more appropriate bail recommendations.
- The automatic entitlement of the detained alien to a redetermination of bond where he or she has been detained in excess of 48 hours.
- The maintenance of statistics and the development of programs for the monitoring of bond determinations so that future bond determinations may be more appropriately set.

Finding 7.3: The present deportation system does not provide all persons apprehended or detained by INS with the opportunity that should be provided for an expeditious or impartial hearing before deportation or removal from the United States.

A hearing is avoided by the device of "voluntary departure," although a deportation hearing could establish facts or constructions of law that provide grounds for relief from deportation. INS law enforcement officers, who are essentially prosecutorial personnel, currently offer voluntary departure to detainees with a warning of the risks of deportation hearings. This is a highly questionable practice, for the line between persuasion and intimidation is very thin, especially where an officer is acting under color of law. Voluntary departure is also a form of discretionary relief that an immigration judge can grant to the detainee after a deportation hearing on the merits of the case. A deportation hearing would prevent the unknowing forfeiture of statutory rights, granted under the Immigration and Nationality Act, which would make some detainees eligible to remain in this country.

The right to a hearing principally means the right to a hearing before an impartial judge. The current INS deportation process has been publicly criticized for not offering at least the appearance of an impartial hearing. This criticism stems primarily from the dual functions of INS, which is charged by statute with both law enforcement and adjudicative functions. The intermingling of the adjudicative and enforcement responsibilities within INS, as illustrated by the dependence of immigration judges on INS District Directors for funds with which to operate, undermines the adjudicative process.

Recommendation 7.3:

a. Congress should amend the Immigration and Nationality Act to establish a separate immigration court independent from the Immigration and Naturalization Service.

b. INS should direct its officers to refrain from counseling detainees to elect voluntary departure.

Finding 7.4: INS administrative arrest warrants are not obtained upon a finding, by a neutral judicial officer, of probable cause for apprehension or detention but because an administrative officer of INS deems it desirable or necessary.

Recommendation 7.4: Congress should amend the Immigration and Nationality Act to provide that administrative arrest warrants may be issued only by a neutral judicial officer on the basis of the finding of probable cause. This amendment to the act is necessary to bring the INS administrative warrant procedure into compliance with the requirements of the fourth amendment.

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[115] Ibid., p. 32.

INVESTIGATION OF MISCONDUCT COMPLAINTS

Chapter 8

Complaint Investigation Procedures of the Immigration and Naturalization Service

Few people today would disagree with the assertion that violations of constitutional rights and denials of due process can result from the improper actions of law enforcement officers. Any abridgment of the rights of an individual arising from improper or illegal actions by government employees must be investigated to ensure that they do not overstep the bounds of proper law enforcement techniques and become overzealous in their duties; this is as true for the INS as it is for other law enforcement agencies.

In 1977 the new administration of INS requested an audit of existing INS complaint investigation procedures, and the Office of Professional Responsibility[1] of the Department of Justice responded by having a 6-month audit done of the INS internal inspections unit. The examination found serious defects in the INS complaint process that prevented a prompt, thorough, and fair investigation of misconduct complaints filed against INS employees. In particular, the audit found:

> 1. Management and internal controls over internal investigations were inadequate. The Audit Staff found it difficult to identify the internal investigative responsibilities of the central, district and regional offices, respectively. There was some confusion over which offices had responsibility for investigating, for reporting, and for monitoring misconduct cases.
>
> 2. Many cases which should have been closed remained in open status. As of July 1, 1977, the central office had 202 open allegations. The Audit Staff reported that of these, "107 were over 1 year old and a number of them were 2 and 3 years old."
>
> 3. Many cases which had been reported to the FBI had not been adequately monitored by the district, regional or central office and some of them had become too old to investigate properly.
>
> 4. INS needs to adopt written policies and procedures to provide internal investigators with guidance on when and how to investigate misconduct allegations. For example, some of the officials interviewed asserted that all misconduct allegations [should] be investigated; others said that anonymous complaints should not be pursued.
>
> 5. The INS internal reporting and accounting system was found to be inadequate. Regional offices did not follow any standard procedures in reporting misconduct allegations to the central office and top management at INS was not regularly informed of allegations referred to the FBI.
>
> 6. After reviewing misconduct allegations, INS officials did not assign the most experienced investigators to handle the complex and serious cases.
>
> 7. INS officials were not reporting all allegations of serious misconduct to the Attorney

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[1] The internal complaint investigation unit of the Immigration and Naturalization Service was renamed the Office of Professional Responsibility in December 1978 (it was previously known as the Office of Professional Integrity). Unless otherwise noted, the use of "OPR" or "Office of Professional Responsibility" in the text and footnotes of this chapter refers to the INS complaint investigation unit, not the Department of Justice complaint investigation unit. References to the DOJ Office of Professional Responsibility will be clearly indicated.

> General's Office of Professional Responsibility, as required under 28 C.F.R. §0.39 *et seq.* (1976).[2]

These findings clearly indicate that before 1977 the INS procedures for investigating and eliminating employee misconduct were not efficient or effective and did not adequately protect the rights of individuals.

The new administration at INS has attempted to improve the agency's internal investigations process. In April of 1978, INS restructured its complaint investigations unit and implemented new complaint handling procedures,[3] seeking better complaint monitoring through the adoption of a case-control system, whereby each complaint is recorded on a master log so that its progress can be followed.[4] More rapid processing of complaint cases has also been required under a new maximum time limit for investigations.[5] Complaint investigations have been made more efficient by requiring a preliminary inquiry in each case prior to a full investigation, and all Service employees are responsible for reporting any allegations of employee misconduct of which they have knowledge. Moreover, INS has retained responsibility for keeping track of complaints referred to other agencies for investigation and for reporting all complaints to the DOJ Office of Professional Responsibility and the Attorney General.[6] However, as testimony at the regional open meetings and the Commission's Washington hearing points out, deficiencies remain in the INS complaint process that prevent an adequate response to public complaints of officer misconduct.

A better response to misconduct complaints is required not only to protect the civil rights of individuals, but also to achieve or maintain the level of community cooperation necessary for effective enforcement of the laws. Without community cooperation, law enforcement agencies would be unable to prevent, investigate, or resolve many violations of law.[7]

Thorough complaint investigation by law enforcement agencies not only fosters community cooperation by protecting community residents from officer misconduct, but also serves to shield officers from unfounded allegations. A failure to respond, or an inadequate response, to citizen complaints of officer misconduct can result in public mistrust of legal authorities and can exacerbate tensions between the community and its law enforcement agencies. Director Paul Kirby[8] of the INS Office of Professional Responsibility[9] has supplied statistics which indicate that United States citizens and aliens do lodge complaints against INS employees. These statistics show that of the 354 cases opened in fiscal year 1978, 70 were filed by United States citizens and 139 by aliens.[10]

In evaluating the INS response to community complaints, it is appropriate to compare the INS internal investigations system as administered by its Office of Professional Responsibility (OPR) with analogous procedures designed for the internal investigations units of police departments. Several studies conducted by national law enforcement organizations and advisory groups have attempted to define the minimum standards necessary to maintain the effectiveness of police department internal investigations units and to develop greater community support for the efforts of police officers. Where applicable, the recommendations of the National Advisory Commission on Criminal Justice Standards and Goals,[11] the LEAA National Institute of Law Enforcement and Criminal Justice,[12] and the Police Foundation[13] are used here as standards of comparison for evaluating the adequacy of the INS complaint investigation process.

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[2] U.S., Department of Justice, Office of Professional Responsibility, "1977 Annual Report to the Attorney General," pp. 9–10 (hereafter cited as DOJ 1977 Report). The DOJ Office of Professional Responsibility is responsible for overseeing the "integrity and functions" of the various internal investigations units throughout the Justice Department, one of which is the INS Office of Professional Responsibility.

[3] Operations Instruction (hereafter cited as OI) 287.10. INS procedures for investigating complaints of misconduct by Service employees are set out definitively in OI 287.10. It should be noted that the Service's Investigator's Handbook prescribes certain investigative procedures to be used in conducting professional integrity investigations that are not included in the OI, or are possibly inconsistent with OI requirements. INS states that the Investigator's Handbook is:

> only a short guide to aid in successfully conducting and competently reporting investigations. . . .The HANDBOOK is concerned with investigative operations only. It is an adjunct to, not a substitute for, the regulations, operations instructions, and other published Service material.

U.S., Department of Justice, Immigration and Naturalization Service, *I & NS Investigator's Handbook* (Mar. 14, 1960), Foreword.

[4] OI 287.10(i).

[5] OI 287.10(e)(1).

[6] Mario T. Noto, Deputy Commissioner, INS, memorandum to Michael E. Shaheen, Jr., Counsel, DOJ Office of Professional Responsibility, July 7, 1978.

[7] Louis A. Radelet, *The Police and the Community* (1973), p. 7. Witnesses at the regional open meetings testified that community cooperation is an integral part of INS enforcement efforts. The representative of a community organization in New York stated that INS uses tips and other information obtained from community residents to make apprehensions. Oscar Monegro, Dominican Alliance, testimony before the New York State Advisory Committee to the U.S. Commission on Civil Rights, open meeting, New York City, Feb. 16–17, 1978, vol. 1, p. 70 (hereafter cited as New York Open Meeting Transcript). A former INS official confirmed reports that information from citizens, as well as its own intelligence operations, provides the basis for some apprehensions by INS. Henry Wagner, former Assistant Director of Investigations, New York INS District Office, testimony, New York Open Meeting Transcript, vol. 2, pp. 140–41. INS has also instituted a program known as "Operation Cooperation" or the "Denver Project," which is discussed in chapter 5 of this report, to obtain employer cooperation in screening out and refusing to hire undocumented workers.

[8] Mr. Kirby resigned from the Service in August 1979. He was the Director of the Office of Professional Responsibility from April 1978 until his resignation.

[9] The INS Office of Professional Responsibility was known as the Office of Professional Integrity until December 1978.

[10] Paul Kirby, letter to Office of the General Counsel, U.S. Commission on Civil Rights, Jan. 18, 1979. Statistics indicate that 24 complaints were received from anonymous sources, 45 from other agencies, 63 from INS employees, and 13 from "other sources."

Six components necessary for a responsive complaint investigation system will be considered: prompt complaint resolution, general public awareness of the complaint process, notification to complainants, sound investigation procedures, careful selection of investigators, and compilation and publication of complaint statistics.

Complaint Resolution

A law enforcement agency must have a complaint investigation process that is swift, thorough, and fair. Undeniably, prompt responses to complaints and thorough investigations inspire public as well as employee confidence in an agency, thereby enhancing its reputation for fairness. Quick resolution of a complaint protects the public from officer misconduct, as well as innocent employees from unfounded charges of misconduct, but a delayed or incomplete investigation fails to achieve either objective adequately.

Speedy complaint resolution has been recognized as essential in obtaining good community cooperation in law enforcement efforts,[14] and thus "a maximum investigative time limit for adjudication of complaints should be established and strictly enforced," unless an extension, approved by the chief executive of the agency, is justified.[15] One study notes that most agencies which have imposed investigative time limits allow 30 days to handle complaint investigations and require that, in the event of an extension, notice be given to both the complaining party and the accused officer.[16] Another study concludes that 3 months should be sufficient for resolving complaints and that, even though the officer is also being prosecuted for a criminal offense, the agency investigation should continue as rapidly as possible.[17]

As the audit by the Department of Justice established, INS complaint processing was far from adequate. Mario Noto, then INS Deputy Commissioner, testified that, when he took office in 1977, the internal investigations unit had a huge backlog of cases awaiting investigation. He described the investigations unit as:

> [A] helter-skelter operation, run by a few individuals who felt that they were accountable only to themselves and to God. The net result of it was that I inherited hundreds of cases that had been hanging on, subject to investigation for years, on some of the most flimsy of allegations which should have been clarified very soon and which, unfortunately, cast a cloud upon the individuals concerned, bringing about havoc in private lives, impeding effective and efficient operations, and, in short, the unit called the internal investigations unit had been left to its own devices and it operated on the whim, the caprices of the people that were immediately responsible for its administration and supervision.[18]

The Department of Justice similarly criticized the backlog of cases,[19] specifically finding that in 1977 more than 50 percent of the 202 open cases had not been investigated and resolved within a year after the complaint had been filed. Some complaints, which had been referred to other agencies for investigation, could not be handled properly because long periods of time had elapsed from the date of their referral and INS had failed to keep track of them.[20]

The INS, in response to the Justice audit, restructured its internal investigations unit into the Office of Professional Responsibility (OPR). New internal guidelines were drafted and implemented to accomplish, among other things, speedier complaint investigation and resolution[21] through measures such as the establishment of a maximum investigative time limit of 60 days after the date a case is assigned for investigation.[22]

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[11] National Advisory Commission on Criminal Justice Standards and Goals, "Report on Police" (1973).

[12] U.S., Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice, "Prescriptive Package: Improving Police/Community Relations," (1973) (hereafter cited as "Improving Police/Community Relations").

[13] Police Foundation, *Police Personnel Administration* (1974).

[14] LEAA, "Improving Police/Community Relations," p. 48.

[15] National Advisory Commission on Criminal Justice Standards and Goals, "Report on Police," pp. 483, 486.

[16] Ibid., p. 486.

[17] Police Foundation, *Police Personnel Administration*, p. 200.

[18] Mario Noto, testimony before the U.S. Commission on Civil Rights, hearing, Washington, D.C., Nov. 14–15, 1978, p. 210 (hereafter cited as Washington Hearing Transcript). Mr. Noto resigned from the Service in Septmeber 1979. He was the Deputy Commissioner from 1977 until his resignation.

[19] DOJ 1977 Report, pp. 8–10.

[20] Ibid., p. 9. See also the text accompanying n. 1 of this chapter.

[21] OI 287.10.

Although the INS should certainly be commended for the new guidelines and the reduction in the number of open cases, a signifcent backlog of cases existed as of the end of FY 1978, as can be seen from OPR workload statistics. Out of 464 cases closed in FY 1978, 245 cases involved complaints that had been received during FY 1977 or earlier, with only 219 cases both opened and closed in FY 1978. The other 149 cases received in FY 1978 were still pending or awaiting final action[23] at the end of the fiscal year. The total backlog, however, was larger, due to unresolved complaints received between FY 1974 and FY 1978. Although complete statistics could not be obtained for that period, OPR acknowledged that in one category, complaints alleging physical abuse of aliens by INS employees, 26 complaints received between February 1974 and October 1978 were still unresolved at the end of the fiscal year.[24] Since 1978, however, the INS has improved its handling of OPI cases and reduced its processing backlog.[25]

Public Awareness of the Complaint Process

Incidents of officer misconduct can be reduced where the general public participates by reporting instances of improper officer conduct, but to encourage the reporting of violations, the public must be fully informed that a complaint process exists within an agency. To the extent that it helps in reducing incidents of officer misconduct, public awareness of the complaint process also serves to improve a law enforcement agency's relations with the community and can result in greater community cooperation in effective law enforcement. It is in the best interest of every law enforcement agency to seek improved relations with the public by informing it of the agency's complaint process[26] and by designing complaint procedures to facilitate the filing of complaints by members of the community. As suggested in one study on law enforcement, supplying complaint forms to supervisory personnel and to various community organizations would be but one example of the steps that could be taken in this direction.[27]

In spite of the importance of public awareness, no evidence was presented to the Commission of any formal INS program[28] or systematic procedure[29] to inform the public either of its right to file complaints or of the INS process and procedures for filing complaints. Consequently, members of the public are not always aware that an INS complaint process exists.[30] This lack of public knowledge about the existence of a complaint process at INS deters persons who wish to complain of rude treatment, improper investigative techniques, or other INS misconduct. A proper public information program would certainly help counteract suggestions that some aliens may not file misconduct complaints because they may assume, based on their experience with repressive law enforcement techniques in other countries, that no INS complaint process exists.[31]

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[22] OI 287.10(l)(1) provides:

> (l) *SUBMISSION AND REVIEW OF REPORTS OF INVESTIGATION* —(1) *Deadline completion.* All investigations of alleged misconduct not pending with another agency must be completed and reports written and submitted within 60 days of the date assigned. Each case shall be called up 45 days from the date of assignment to assure timely completion of the investigation.

[23] Paul V. Kirby, Director, OPR, letter to Office of the General Counsel, U.S. Commission on Civil Rights, Oct. 31, 1978. In that correspondence, Director Kirby stated that 368 cases were received by OPR. However, later correspondence to the Commission stated that 354 cases were opened by OPR in FY 1978. Paul V. Kirby, letter to Office of the General Counsel, U.S. Commission on Civil Rights, Jan. 18, 1979. The reason for this discrepancy is not readily apparent.

[24] Ibid.

[25] The INS has stated that:

> The Service believes that statistics will show that our Office of Professional Responsibility is responsive to complaints and resolves them in a prompt, thorough, and fair manner. From the beginning of Fiscal Year 1979 on October 1, 1978, through the end of July 1979, the Office of Professional Responsibility received 291 allegations of employee misconduct. During this same period, 130 of these allegations were closed by investigation. At the end of July 1979 our monthly report to the Department concerning allegations of misconduct reflected 36 open cases which had been received prior to the beginning of FY 1979. A breakdown of these cases shows that investigation is being withheld in four (4) cases at the request of the Department of Justice which has itself initiated investigations in these matters. Six of these cases are under investigation by other Federal agencies. Our Office of Professional Responsibility has eleven of these cases under investigation, one of which is being handled by local jurisdiction and monitored by COPRR [the Office of Professional Responsibility of the INS Central Office]; one case is now before a grant jury; a civil action has been filed in two of these matters, and we are therefore withholding further investigation until resolution of the civil action. Twelve cases have since been closed and of this number four have been referred to our personnel function to consider disciplinary action. Also among these closed cases are two criminal prosecutions, one which has resulted in the conviction of the employee and the indictment of the other. Presently there are 153 open cases of all types, some of which are under investigation by other agencies, being considered for prosecution by United States Attorneys or being investigated by our Office of Professional Responsibility.
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> It is important to note that all but one of these 36 older cases alleged criminal misconduct as do the majority of all allegations received and investigated by our Office of Professional Responsibility. The undertaking of a criminal investigation involving any government employee is a grave responsibility and is not taken lightly by our Professional Responsibility staff. A thorough investigation is required in each case, and in the interest of justice and fairness to the employee, no time limit can be set for the resolution of such matters once our preliminary inquiry has established sufficient corroborative evidence that reasonably supports the allegation.

Leonel J. Castillo, Commissioner, INS, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Sept. 28, 1979, pp. 7–8 (hereafter cited as Castillo Letter).

[26] National Advisory Commission on Criminal Justice Standards and Goals, "Report on Police," p. 477.

[27] LEAA, "Improving Police/Community Relations," p. 47.

[28] Paul Kirby, testimony, Washington Hearing Transcript, pp. 73–74.

[29] Ibid.

[30] This lack of public awareness of INS complaint procedures is discussed later in this section.

In spite of its failure to establish a systematic procedure for the reception of public complaints, INS has recently attempted to create a greater public awareness of INS complaint procedures. High-ranking INS officials, in public appearances starting in 1977, have increased their efforts to inform the public of INS willingness to investigate complaints of misconduct,[32] and testimony in San Diego revealed that a Community Border Affairs Advisory Council has been created in that city and that the INS has taken action on complaints forwarded by that group.[33]

These efforts notwithstanding, other testimony presented to the Commission indicates that the public remains inadequately informed of INS complaint procedures, as exemplified by the statement of the executive director of Mexican American Social Services in Los Angeles that he was not aware of any "particular structure within the INS" to receive and handle complaints against officers.[34] Of greater concern is testimony from the Los Angeles open meeting on June 16, 1978, indicating that even one of the INS immigration judges was not aware of the proper procedure for filing a complaint. When asked where an individual could complain, the judge responded, "Well, I suppose he could start off with the supervisor, and then go right up front to the District Director."[35] Although an immigration judge has no direct role in the resolution of complaints, such complaints are likely to be raised in the course of deportation proceedings, and every judge should be able to advise complainants about the proper manner for lodging a complaint. Immigration judges as well as other agency employees must be able to inform the public fully on INS complaint procedures if employee misconduct is to be prevented.

Notification to Complainants

One of the necessary elements of an effective complaint-processing system is provision for adequate notice of the proceedings to complainants.[36] In investigating complaints of misconduct, it is essential that complainants always be advised (preferably in writing but at least orally) of the results of the investigation and the final disposition of the complaint.[37] According to the National Advisory Commission on Criminal Justice Standards and Goals, an effective complaint process would include the following elements:

> a. The complainant should receive verification that his complaint is being handled;
>
> b. the complainant should receive a general description of the investigative process and appeal provisions; and
>
> c. the complainant should be notified of the final disposition of his complaint.[38]

When compared to these standards, INS internal investigation procedures are deficient in several respects. First, the INS complaint procedure as set forth in its Operations Instruction does not require INS to notify complainants that their complaints have been received and will be investigated, to provide them with copies of complaints, or to interview them during the investigation.[39] Despite the absence of such a provision in its Operations Instruction, the INS has informed the Commission that chapter 23, pages 6-7, of its Investigator's Handbook provides that complainants should be interviewed. The INS stated that:

> It is the practice of our Professional Responsibility staff to interview the complainant if he or she is the victim, or when the aggrieved party or the victim is not identified or specifics concerning the misconduct are not provided by the complainant. It is not good investigative

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[31] Austin Fragomen, testimony, New York Open Meeting Transcript, vol. 1, p. 247. Mr. Fragomen, a practicing immigration attorney and professor of immigration law at New York University and Brooklyn Schools of Law, is the former staff counsel to the Immigration, Citizenship, and International Law Subcommittee of the House Judiciary Committee.

[32] Kirby Testimony, Washington Hearing Transcript, p. 79.

[33] Donald Cameron, testimony before the California Advisory Committee to the U.S. Commission on Civil Rights, open meeting, San Diego, June 26, 1978, p. 248 (hereafter cited as San Diego Open Meeting Transcript). Mr. Cameron is the Chief Patrol Agent, U.S. Border Patrol, Chula Vista, Calif.

[34] Delfino Varela, testimony before the California Advisory Committee to the U.S. Commission on Civil Rights, open meeting, Los Angeles, June 15-16, 1978, p. 464 (hereafter cited as Los Angeles Open Meeting Transcript).

[35] Jay Segal, testimony, Los Angeles Open Meeting Transcript, p. 495. Judge Segal is the Senior Immigration Judge of the Los Angeles INS District.

[36] As with any complaint-processing system, management and supervisory personnel of a law enforcement agency should ensure that any person who files a complaint is treated courteously throughout the investigative process. LEAA, "Improving Police/Community Relations," p. 47.

[37] Police Foundation, *Police Personnel Administration*, p. 200.

[38] National Advisory Commission on Criminal Justice Standards and Goals, "Report on Police," p. 477.

[39] *See* OI 287.10.

practice to initiate an inquiry based upon hearsay or secondhand information.[40]

Second, the INS complaint procedure does not require the Service to provide complainants with a description of the investigative process or of any appeal mechanisms available to them. Third, and most important, the INS process for investigating misconduct complaints fails to provide that complainants be notified of the outcome of their complaints, regardless of whether or not they result in disciplinary action against an INS officer.[41]

It is only through notification of all these elements that the public can be assured that the INS is interested in eliminating employee misconduct by its investigation of all complaints. Testimony from the open meetings indicates that, although INS is not required to notify complainants that their cases are being investigated, in practice INS does notify some individuals that investigations are being conducted. In California, the INS has acknowledged and taken action on complaints forwarded by the Community Border Affairs Advisory Council of San Diego,[42] and in Texas, a county judge testified that he had received notification of the receipt of his complaints and the results of INS investigations of them.[43]

Failure to notify all complainants, however, can result in a public perception that INS is not investigating in good faith all complaints it receives. A witness at the San Diego open meeting testified on June 26, 1978, that complainants receive no response from INS after filing complaints, and this failure by INS to respond leads them to conclude that some complaints are referred from office to office and are not acted upon for as long as a year.[44]

Investigative Procedures

INS procedures for investigating complaints of misconduct by employees are set out in the agency's internal Operations Instruction.[45] Briefly, they provide that when a complaint is received in an INS district office, Border Patrol sector office, or OPR, it is forwarded either to the OPR Central Office or to the INS Regional Commissioner, depending on the nature of the complaint. Generally, the OPR Central Office investigates allegations of serious misconduct, including such criminal activity as bribery, graft, and conflicts of interest, and violations of the Federal Civil Rights Act.[46] The Regional Commissioners oversee most investigations of allegations of administrative misconduct, including violations of Service rules and procedures and noncriminal activity that adversely affects the efficiency or reputation of INS.[47]

In either case, after a complaint has been received and logged but before it is actually investigated, the complaint is analyzed by OPR or the Regional Office to determine whether the alleged offense is "*prima facie* misconduct" by a Service employee.[48] If such evidence is contained in the complaint, an investigation proceeds in two stages.

Preliminary Inquiry. When a determination is made that a complaint involves *prima facie* misconduct by an INS employee, the Director of OPR or the Regional Commissioner will assign an investigator to conduct a "preliminary inquiry," defined as a "fact finding effort to determine whether an allegation of misconduct involving a Service employee warrants further investigation."[49] When an investigator is assigned to do a preliminary inquiry, INS procedures merely provide that he or she be "contacted by telephone and furnished pertinent information concerning the allegation and given direction for expeditiously conducting and completing the inquiry."[50] INS complaint procedures as set forth in its Operations Instruction do not require that the investigator actually receive a copy of the complaint, or any supporting documentation, or that he or she be notified in writing of the assignment and of the facts of the allegation at any time after the assignment by telephone. These omissions in the investigation procedure indicate that the Service fails to ensure that the rights of either the complainant or the accused employee are protected. The investigation itself may suffer if the investigator does not have the details of an allegation, including a copy of the written complaint, readily available to him or her during his investigation. It is conceivable that information not relayed initially by telephone because it did not seem important or "pertinent"[51] could be pivotal in a decision to conduct a full investigation rather than terminate all investigation efforts. The accused employee's right to a fair investigation may also be prejudiced if the investigator is not given a copy of the complaint, because an investigator who is not able to plan the inquiry according to the facts alleged in a complaint may, consciously or unconsciously, investigate some aspects of the accused employee's life that are irrelevant to the complaint at hand. While INS has stated that it does, in fact, give each investigator assigned to handle an OPR case a copy of the alleged facts, this procedure is not required by the Operations Instruction.[52]

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[40] Castillo Letter, p. 8.

[41] *See* OI 287.10.

[42] Cameron Testimony, San Diego Open Meeting Transcript, p. 48.

[43] Jose Angel Gutierrez, Zavala County Judge, testimony before the Texas Advisory Committee to the U.S. Commission on Civil Rights, open meeting, San Antonio, Sept. 12-14, 1978, vol. 6, pp. 58-59.

[44] Alberto Garcia, immigration consultant, testimony, San Diego Open Meeting Transcript, p. 55.

[45] OI 287.10.

[46] OI 287.10(d). These offenses are classified as "category I" violations.

[47] OI 287.10(d). However, OI 287.10(e)(4) provides that the OPR Central Office shall handle allegations of "category II" violations filed against the officer corps, supervisory employees, attorneys, special inquiry officers, and law clerks.

[48] OI 287.10(i)(2). If the alleged offense was committed by someone other than an immigration officer (for example, a Customs Service officer) or if the alleged acts would not constitute misconduct even if true, INS does not investigate the complaint. OI 287.10(i)(2). However, where misconduct allegations involve employees of other agencies, the Director of OPR is responsible for referring that complaint to the appropriate agency. OI 287.10(e)(6)(vii), (i)(2)(b).

[49] OI 287.10(j)(1).

[50] OI 287.10(j)(2).

Full Investigation. After an investigator has completed the preliminary inquiry and forwarded a report to the Director of OPR or a Regional Commissioner, the report is reviewed by that office to determine whether a further investigation into the complaint is "warranted,"[53] which depends upon whether the facts developed by the preliminary inquiry "reasonably support" the complaint of misconduct.[54] If the facts developed by the preliminary inquiry do not "reasonably support" the allegation of misconduct, the matter will be closed and the investigation ends.[55] Statistics provided by OPR Director Kirby indicate that of the 354 cases of misconduct opened in fiscal year 1975, 121 allegations were closed after the preliminary inquiry.[56] It is unclear, however, what amount and type of evidence is necessary to "reasonably support" a misconduct complaint and to justify a full investigation.

Because this standard as set forth in the Operations Instruction is ambiguous and can be interpreted to require a level of evidence ranging from a mere shred to a substantial amount, it is possible that a complaint will be dismissed even though some evidence exists favoring further investigation.[57] To maintain public confidence in OPR's integrity and to promote professionalism among INS employees, it is important to ensure that meritorious complaints are not summarily closed due to inconsistent interpretations of the "reasonably support" standard, particularly since there is no agency appeal mechanism for dissatisfied complainants.[58] INS complaint procedures as set forth in the Operations Instruction fail to require that any evidence supporting a complaint of misconduct be given thorough consideration and that all doubts at the preliminary inquiry stage be resolved in favor of a more thorough investigation.

Where a full INS investigation is warranted, the assigned investigator usually has 60 days to complete the investigation and written report,[59] which will be reviewed by the Director of OPR or the Regional Commissioner to determine the disposition of the complaint.[60]

To provide flexibility in the disposition of complaints, and to promote fairness to all parties involved, the National Advisory Commission on Criminal Justice Standards and Goals recommends the use of five classifications in disposing of investigated complaints: "sustained," "not sustained," "exonerated," "unfounded," or "misconduct not based on the original complaint."[61] Briefly, an allegation would be "sustained" when an accused employee committed all or part of the alleged acts of misconduct, while a "not sustained" disposition indicates that the investigation produced insufficient information either to prove clearly or disprove the allegations. "Exonerated" is used where the alleged act did occur, but was justified, legal, and proper in view of all the circumstances. A complaint would be "unfounded" where the alleged act did not occur, while a finding of "misconduct not based on the original complaint" indicates that there is evidence of misconduct other than that alleged in the original complaint. The National Advisory Commission considers inclusion of the last category of "misconduct not based on the original complaint" as necessary to ensure that the public does not misinterpret the number of sustained complaints reported.[62]

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[51] Ibid.

[52] INS has stated that its actual procedures for notifying investigators of OPI assignments are as follows:

> Operation Instruction 287.10 does provide, as noted, that the field officer selected be contacted by telephone. This telephone call is to alert that officer to his pending detail and to its purpose. At that time he is verbally provided all available material in the possession of the Professional Responsibility office. If copies of that material are available in the field, as is usually the case, the assigned field officer is advised of this fact and will, upon arrival at the location of his investigation, obtain the material. He is advised of the name and the location of the complainant or victim (if made known by the complainant and not anonymous) and, consistent with the Investigator's Handbook, will interview and obtain a sworn statement from such complainant. Otherwise the assigned field investigator will obtain all the necessary data in the form of sworn statements from the aggrieved party or the victim of the alleged act of misconduct. As previously stated, a field officer is under the direct control and guidance of a Professional Responsibility staff officer. Field officers are expected to contact their control staff officer daily by telephone. Such officer is constantly updated whenever new information becomes known to his staff control officer.

Castillo Letter, p. 9. It should be noted, however, that these procedures have not been incorporated in OI 287.10.

[53] OI 287.10(k).

[54] OI 287.10(k)(2).

[55] OI 287.10(k)(1).

[56] Paul Kirby, letter to Office of the General Counsel, U.S. Commission on Civil Rights, Jan. 18, 1979.

[57] INS has stated that, in practice:

> The term "reasonably supports" is used in the same sense as is the term "probable cause," i.e., an act of misconduct has probably been committed and a known or unknown INS employee has probably committed that alleged act. The procedure followed within our Office of Professional Responsibility is that *all* evidence gathered during either a preliminary inquiry or investigation is thoroughly reviewed by Professional Responsibility staff officers. These are highly experienced Criminal Investigators selected for their competence and known for their objectivity. Any doubts they may have concerning the evidence or the lack of evidence is resolved in favor of a full or further investigation. If the evidence reasonably supports criminal misconduct during the preliminary investigation stage, the case will be referred to another agency for investigation, if appropriate, or will be brought to the attention of the United States Attorney having jurisdiction.

Castillo Letter, p. 8. It should be noted, however, that these provisions are not incorporated in OI 287.10 or the *I&NS Investigator's Handbook.*

[58] OI 287.10(k)(1). This section merely provides that, where further investigation of a complaint is not warranted, the case will be closed, the case control log will be so noted, and the accused employee will be notified of this action. Notice to the complainant of the results of the inquiry or of his or her right to appeal is not required or discussed.

[59] OI 287.10(l).

[60] OI 287.10(m).

Under the INS complaint procedures as set forth in the Operations Instruction, an allegation is classified in one of only two categories, either as "sustained," where the facts developed by investigation reasonably support the allegation of misconduct, or "not sustained," where the investigation fails to substantiate the allegation of misconduct.[63] No definition is provided for the terms "reasonably support" or "fails to substantiate," and no clear evidentiary standard is set forth to guide the decisionmaker in determining whether an allegation should be sustained. Although the Operations Instruction sets forth only two categories for complaint disposition, INS has stated that, in practice, it actually uses a four-classification system which does not include the category "misconduct not based on the original complaint."[64]

Selection of Investigators

Investigators who conduct Office of Professional Responsibility field investigations are selected by the appropriate Regional Commissioner or by the Director of OPR.[65] Such investigators usually handle professional integrity cases only on a part-time basis and are drawn from the Service's existing pool of investigators,[66] whose full-time duties primarily consist of doing background searches on applicants who seek immigration benefits.

Although INS does recognize and designate certain types of investigations as being more complex than others and has attempted to allocate its most experienced investigators to such cases,[67] there is apparently no written standard, procedure, or guideline used by INS to select investigators to handle professional integrity cases.[68] When asked to describe the selection procedures, OPR Director Paul Kirby testified: "We try to take the most capable men, and we have asked for volunteers. They like to put it in their resumes, but I don't think they like to be called an 'internal investigator'."[69]

A Regional Commissioner or the Director of OPR may, in fact, consider the complexity of a case and the relative experience of an investigator in deciding case assignments. However, such consideration is not required under INS procedures as set forth in the Operations Instruction, leaving open the possibility that a complex case will be given to an inexperienced officer and a simple case to a seasoned officer. In its *1977 Annual Report to the Attorney*

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[61] National Advisory Commission on Criminal Justice Standards and Goals, "Report on Police," pp. 487–88.

[62] Ibid., p. 488. The National Advisory Commission report stated:

> Without the category of "misconduct not based on the original complaint," the number of sustained complaints might be subject to public misinterpretation. The investigation of complaints from the public alleging such acts as excessive force, discourtesy, and dishonesty, frequently are not sustained because of lack of sufficient information. During the investigation, however, such acts of misconduct as failing to prepare a report, improperly disposing of property, or some other irregularity, might be discovered. If the complaint simply is classified as sustained, it is difficult to know whether the judgement is based upon the original allegation or upon misconduct discovered later.

[63] OI 287.10(m). A sustained allegation of category I misconduct is referred to a U.S. attorney for possible prosecution, while a sustained allegation of category II misconduct is submitted to an INS Associate Commissioner for Management for appropriate corrective action. In the case of an unsustained allegation, the file is closed and a letter from the Director of OPR or a Regional Commissioner is sent to the involved employee notifying him of this disposition.

[64] INS has described its procedures as follows:

> The terms "sustained," "not sustained," "exonerated," and "unfounded" are used by our Office of Professional Responsibility despite the fact that Service Operations Instruction 287.10 sets forth only the terms "sustained" and "not sustained." These terms are used by the Professional Responsibility staff as set out in chapter 23 of the INS Investigator's Handbook, page 6. The term "misconduct not based on the original complaint" has not previously been used by our Professional Responsibility staff but most certainly can be added to our list of terms.

Castillo Letter, p. 8.

[65] OI 287.10(j)(2).

[66] Kirby Testimony, Washington Hearing Transcript, p. 73.

[67] The Operations Instruction provides that an OPR staff officer from the Central Office should be assigned to conduct investigations involving certain category I offenses committed by supervisory officer corps employees or managers. OI 287.10(k)(2)(i), (iii).

[68] OI 287.10(j)(2) merely provides that the "Director of OPR or Regional Commissioners (or their designee) will select an employee to conduct a preliminary inquiry."

[69] Kirby Testimony, Washington Hearing Transcript, p. 73.

General, the Department of Justice's Office of Professional Responsibility[70] reported that INS did not assign its most experienced investigators to handle complex and serious cases of professional integrity.[71] An investigator's experience in handling OPR cases has been an especially important consideration because, until 1978, no special training in techniques for investigating professional integrity cases was available to inexperienced officers. Informal training is now provided by the Deputy Director of OPR, who "went out into each of the regions and drew on people from the regions to instruct them in OP[R]-type investigations. These are investigators from all fields in INS."[72] INS has stated that it is Service policy to assign professional integrity cases to only those investigators who have received training in handling such cases.[73]

To minimize possible professional or personal conflicts in the conduct of preliminary inquiries and full investigations, nonsupervisory investigators assigned to a case may not be from the same operating branch as the accused employee,[74] but they may handle cases arising in the region to which they are assigned. Supervisory investigators have fewer restrictions and are also allowed to handle cases in their same district or sector. Given the structure of the INS career ladder and the high degree of mobility within the officer corps, the current scheme as set forth in the Operations Instruction permits an investigator to handle a case involving a past or prospective supervisor, an employee he or she has supervised, or a friend or colleague, even though INS has stated that its investigators are questioned as to any prior relationships before they are assigned to a case.[75] Although current provisions for the assignment of investigators are an improvement over previous procedures,[76] it is still possible that investigators may be influenced, consciously or not, by their working relationship with the employees they are investigating.

Law enforcement agencies, such as INS, that have daily contact with the public in the performance of their duties have an obligation to assure those communities that the law is administered in a fair and impartial manner. It has been recognized that, in establishing a disciplinary system to process misconduct complaints against police officers, the internal investigation unit should include minority-group officers as well as white officers, and it is preferable that all officers have an established reputation for fairness in the minority community.[77] The selection of officers for their investigative ability, fairness, and commitment to the elimination of officer misconduct or misuse of authority is an important consideration in creating a good relationship between the community and a law enforcement agency.

Investigators assigned to perform professional integrity investigations are selected from the current pool of INS criminal investigators. A breakdown of INS investigators by race, national origin, and sex for fiscal year 1978 reveals that, out of a total of 1,076 investigators, 130 (approximately 12 percent) were members of minority groups. Of this number, 44 investigators were black, 81 were Hispanic, 4 were Asian American, and 1 was American Indian. There were 46 female investigators, but no statistics were provided as to their ethnic breakdown. Of the total 115 supervisory investigators, 8 (approximately 7 percent) were members of minority groups. Five supervisors were black, 3 were Hispanic, and none was female.[78]

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[70] In 1977 the Justice Department's Internal Audit staff reviewed the operations of the OPI (now OPR) in INS and published its findings in the annual report of the DOJ Office of Professional Responsiblity. Richard Rogers, DOJ Office of Professional Responsibility, Deputy Counsel, testimony, Washington Hearing Transcript, pp. 71–72.

[71] DOJ 1977 Report, p. 10.

[72] Kirby Testimony, Washington Hearing Transcript, p. 72.

[73] The INS informed the Commission that:

> The selection of field officers to conduct these investigations is made by a Central Office staff officer through the Service Regional officers, but it is the Central Office staff officer who requests a specific individual to conduct an investigation in a specific matter. These field officers are to be only those who have previously been trained during a Professional Responsibility conference. If at any time a trained field officer shows a lack of impartiality or objectivity, a breach of confidence, or in any manner indicates that he has not done a full and credible investigation to gather all the facts, that officer will not again be used to conduct a Professional Responsibility investigation. This determination to discontinue a field officer is based upon a review of his work by an experienced staff officer.
>
> The selection of field officers for Professional Responsibility training is based in part upon their grade, experience and background, and these determinations are made through discussions with their supervisors, the Regional officers or others intimately familiar with that officer's work, personality, and habits.

Castillo Letter, pp. 8–9. It should be noted, however, that these provisions have not been incorporated in OI 287.10 or the *I&NS Investigator's Handbook.*

[74] OI 287.10(j) & (k).

[75] In a letter to the Commission, the INS stated:

> It should also be noted that all field officers assigned Professional Responsibility investigations are under the direct control of a Central Office staff officer who advises and guides that field officer during his investigation. Prior to any assignment, field officers are questioned as to any prior acquaintances or relationship they may have had with the accused employee. If a prior relationship exists or for any reason the field officer feels that he cannot properly conduct the investigation because of the accused employee's position, another field officer will be selected. Our aim is total impartiality and objectivity.

Castillo Letter, p. 9. It should be noted, however, that these provisions have not been incorporated in OI 287.10 or the *I&NS Investigator's Handbook.*

[76] Mario T. Noto, INS Deputy Commissioner from 1976 to 1979, testified before a House subcommittee that, prior to 1973, frequently "allegations of employee misconduct were handled at the local level by supervisors who acted as both judge and jury." *Justice Department Internal Investigation Policies (Part 2): Hearings Before a Subcommittee of the House Committee on Government Operations,* 95th Cong., 2d Sess. (1978), p. 156.

[77] LEAA, "Improving Police/Community Relations," p. 47.

In fiscal year 1978, relatively few minority investigators actually handled misconduct complaint investigations. Only 15 Hispanics and 7 females were assigned to investigations of the 354 cases opened in FY 1978.[79] Director Kirby concluded that "it appeared from the review conducted and to the best of our knowledge that the remainder of the investigations were conducted by white males."[80]

Compilation of Complaint Statistics

The internal investigations units of law enforcement agencies should maintain "[c]omplete records of complaint reception, investigation, and adjudication" so that statistical summaries can be compiled and published on a regular basis for all agency personnel and made available to the public.[81] Although it is necessary to keep complaint investigations confidential to protect the privacy of accused employees, public disclosure of statistical summaries of complaint records "does not violate the confidential nature of the process,"[82] and, in fact, "such disclosure is often valuable because it tends to dispel allegations of disciplinary secrecy voiced by some community elements."[83]

Removal of the shroud of secrecy is not the only benefit that can be derived from compilation of complaint statistics. Statistical summaries of complaint records can also be used as a management tool. As one national study on relations between law enforcement agencies and the community stated:

> Complaints from the public provide the police chief executive with invaluable feedback. The complaints, whether factual or not, increase his awareness of actual or potential problems and assist him in his use of problem solving techniques as well as providing him with another basis for evaluating the performance of his agency.[84]

Statistics can be useful in revealing "the number of complaints made against various units and members of the department"[85] and therefore help identify agency problem areas so that management can develop solutions before problems reach a critical point. OPR Director Paul Kirby recognized in his testimony that a study of the types of complaints received, "if it shows that the same people might be committing these same offenses," might be useful to INS in developing solutions to the problem of officer misconduct.[86]

Although the Office of Professional Responsibility submits monthly reports to the Department of Justice and tabulates the staff hours expended in processing OPR cases, there is no requirement that it compile or make public any statistics. Before January 1979, no statistical analysis had been made of the source of complaints received by INS to determine the relative number of allegations filed by INS employees, other United States citizens, or aliens.[87] Moreover, no statistics were compiled on the disposition of misconduct investigations.

In order to provide the Commission with some statistics, OPR reviewed its case files in October 1978. That review, "as complete as [OPR's] records permit," disclosed that only a breakdown by job categories of accused INS employees could be obtained for the 224 complaints of physical abuse of aliens received by the Service between February 1974 and October 1978.[88] The memorandum containing this information further stated:

> Our records, which are incomplete, show that investigation sustained 20 of these allegations and that 26 are presently unresolved. The remainder were either not sustained or there is no record of the results of the investigation.[89]

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[78] Paul Kirby, letter to Office of the General Counsel, U.S. Commission on Civil Rights, Jan. 18, 1979. The statistics were drawn from INS personnel records as of Sept. 23, 1978.

[79] Ibid. Statistics as to the number of minority Professional Responsibility investigators remained at a similar level in 1979.

> Statistically, of the approximately 140 investigators, including trained field and Professional Responsibility staff officers and those currently scheduled for Professional Responsibility training, 16 are minorities (2 black, 14 Hispanic) and 6 are female (1 black). Our Professional Responsibility headquarters investigative staff has one female investigator.

Castillo Letter, pp. 9–10.

[80] Paul Kirby, letter to Office of the General Counsel, U.S. Commission on Civil Rights, Jan. 18, 1979.

[81] National Advisory Commission on Criminal Justice Standards and Goals, "Report on Police," p. 477.

[82] Ibid., p. 479.

[83] Ibid.

[84] Ibid., p. 471.

[85] Police Foundation, *Police Personnel Administration*, p. 200.

[86] Kirby Testimony, Washington Hearing Transcript, p. 83.

[87] Ibid., p. 76.

[88] Paul Kirby, letter to Office of the General Counsel, U.S. Commission on Civil Rights, Oct. 31, 1978.

[89] Ibid.

Steps have recently been taken, however, to compile statistical data as to the types of complainants filing allegations and the disposition of such complaints. In January 1979, Director Kirby, responding to a Commission request for such statistics, provided data for those complaints filed during fiscal year 1978,[90] thereby indicating that the raw data necessary for gathering these statistics do exist. In 1979 the INS stated that it planned to computerize OPR case statistics and to publish such statistics when they became available.[91]

Findings and Recommendations

Finding 8.1: Swift complaint resolution must be achieved to protect the public from misconduct by INS officers and to protect officers from unfounded allegations.

Prompt investigation of misconduct complaints is important for establishing good INS-community relations, for it enhances the integrity of INS in the enforcement and administration of the immigration laws. Although the INS has made substantial inroads into reducing its backlog of Office of Professional Responsibility cases, a significant backlog still exists.

Recommendation 8.1: INS should carefully monitor and enforce the new 60-day maximum investigative time limit imposed on Office of Professional Responsibility cases. INS should notify both the complainant and the accused employee of any delay in completing the investigation where an extension of investigative time is necessary.

Finding 8.2: Public awareness of the INS complaint process is important for reducing incidents of officer misconduct and for improving INS-community relations.

Although INS has taken steps to establish greater public awareness of its complaint process, segments of the public and some agency employees are not fully apprised of the exact procedure.

Recommendation 8.2:

a. INS should take immediate action to design and implement a more comprehensive and systematic procedure to inform the public of the existence of the Office of Professional Responsibility and the process to be used in filing complaints of misconduct. At a minimum, this procedure should include:

- Posting signs in all INS offices;
- Creating and using easily comprehensible complaint forms, in English and in other major languages;
- Making complaint forms available in all INS offices; and
- Supplying complaint forms to community organizations dealing with persons who may wish to file complaints.

b. INS should take prompt action to ensure that Service employees are informed of the existence of the complaint mechanism and the proper procedure to be used in filing complaints. In addition, each INS employee should have available an adequate supply of complaint forms or immediate access to them.

Finding 8.3: The current INS complaint process as set forth in its Operations Instruction does not require notification to the complainant of the receipt of his or her complaint, of the initiation of the investigative process, or of the results of the investigation. To assure the public that an agency is interested in preventing employee misconduct, a complaint process must treat complainants fairly and respond to their complaints. Courteous treatment of complainants and acknowledgment of their complaints are two necessary elements of a good complaint system.

Recommendation 8.3: INS should provide more information to complainants by amending Operations Instruction 287.10 to require the following:

a. Each complainant, upon filing a complaint, shall be provided a copy of the appropriate Office of Professional Responsibility investigation procedures and appeal provisions.

b. Each complainant shall receive written verification from the Office of Professional Responsibility that the complaint has been received and is being investigated.

c. Each investigator assigned to a case must interview the complainant and any other eyewitnesses to the incident.

d. Each complainant shall receive written notification of the result of the investigation into his or her complaint and the sanction, if any, imposed on the officer involved.

Finding 8.4: The INS has taken significant steps to upgrade its complaint-process procedures through the reorganization of its internal investigations unit and the implementation of a new Operations Instruction. Deficiencies, however, remain in the revised complaint process:

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[90] Paul Kirby, letter to Office of the General Counsel, U.S. Commission on Civil Rights, Jan. 18, 1979.

[91] The Service has recently stated that:

> Currently our Office of Professional Responsibility is working with the Service's automatic data processing staff to computerize all case statistics. It is anticipated that full computerization of these records will be a reality in the very near future. At that time our statistics will be readily available and it is our intent to publish these statistics in the INS Annual Report.

Castillo Letter, p. 10.

a. No requirement exists in the Operations Instruction that an investigator be notified in writing of his or her assignment, along with the facts alleged in the complaint, or that he or she receive a copy of the complaint or any supporting documentation provided by the complainant.

b. The ambiguous "reasonably support" standard for determining whether a further investigation should be conducted may result in meritorious complaints being summarily closed. "Reasonably support" is not defined in the Operations Instruction nor are guidelines provided for applying this evidentiary standard.

c. The INS complaint disposition categories, as set forth in the Operations Instruction, of "sustained" and "not sustained" inadequately describe the actual disposition of complaints by the Office of Professional Responsibility. They fail to account for unfounded complaints, situations in which an accused employee is exonerated, and cases involving misconduct not based on the original complaint.

Recommendation 8.4: INS should amend Operations Instruction 287.10 to include the following provisions to improve the existing complaint investigation process:

a. When investigators are assigned to cases, they should be notified in writing of the assignment. They should also be provided with a copy of the complaint or a written statement of the allegations involved. When investigators are assigned to handle a full investigation, they should be given a copy of the preliminary report for that case.

b. A complaint should be dismissed only where a preliminary inquiry does not uncover any evidence of misconduct by an INS employee. The existing standard, which requires that the facts developed must "reasonably support" the allegation, is vague and therefore subject to inconsistent interpretations by decisionmakers. A complaint should not be dismissed after a preliminary inquiry where such inquiry does not clearly exonerate the accused employee.

c. Final disposition of complaints should not be restricted to the two currently existing categories of "sustained" or "not sustained," but should be expanded to include the five categories of "sustained," "not sustained," "exonerated," "unfounded," and "misconduct not based on the original complaint." Such an expanded system allows the decisionmaker greater accuracy and flexibility and increases public faith in the integrity of investigations by the Office of Professional Responsibility. Appropriate evidentiary inquiries should be conducted with a view towards the evidence required for each of the five possible ultimate dispositions of complaints.

Finding 8.5: There is currently no appeal process, in either the INS or the Department of Justice, for complainants whose allegations of INS officer or employee misconduct have not been sustained through investigation of the complaint by INS.

Recommendation 8.5: A Board of Review, as this Commission has recommended in previous public statements,[92] should be established. The members of that Board should be appointed by the Attorney General and its jurisdiction should include the review of INS misconduct complaints where the complainant files an appeal from the finding of the INS investigation.

Finding 8.6: Current INS guidelines as set forth in Operations Instruction 287.10 for selection of Office of Professional Responsibility investigators are inadequate and do not specify the procedure to be followed or particular criteria to be considered in selecting investigators. Inquiries into employees' professional conduct are sensitive operations and require experienced and conscientious investigators. The selection of persons to handle such cases is an important process and should be carefully monitored to ensure that only the best officers are chosen.

Recommendation 8.6: INS should amend its Operations Instruction 287.10 to include specific procedures to be followed by officers wishing to apply for such duty and to include guidelines to be applied in selecting Office of Professional Responsibility investigators. These guidelines should require consideration of such factors as:

a. an appropriate level of experience and skill in conducting investigations, and

b. a demonstrated attitude of fairness, thoroughness, and conscientiousness on the part of the applicant.

Finding 8.7: The guidelines for assignment of investigators to misconduct cases are inadequate.

The complaint process as set forth in Operations Instruction 287.10 does not require that the most experienced investigators be assigned to the most complex and serious cases of alleged misconduct and does not ensure that undue influence or an inference thereof, which may result from past or present working relationships between the investigator and the accused employee, is avoided in the investigator selection process.

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[92] Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, statement, in *The Federal Bureau of Investigation Charter Act of 1979: Hearings on S.1612 Before the Senate Committee on the Judiciary*, 96th Cong., 1st sess. (Oct. 24, 1979).

Recommendation 8.7: INS should amend Operations Instruction 287.10 to include the following provisions to establish an effective and efficient system for assigning investigators to misconduct cases:

a. Investigators should not be assigned to handle professional misconduct cases arising in the same region to which they are assigned.

b. Investigators who are assigned to handle misconduct cases should be given formal training in Office of Professional Responsibility procedures and techniques prior to handling such cases.

c. The most experienced investigators should be given the most complex and serious cases. In determining the complexity and seriousness of a case, such factors as the type of misconduct alleged, the rank of the accused employee, the number of complainants and employees involved, and the amount of any publicity received should be considered.

Finding 8.8: The small number of minority-group investigators selected and assigned by INS to handle misconduct complaint cases affects the public's perception of the fairness and impartiality of the investigation of complaints.

Community perceptions of the fairness and thoroughness with which public complaints are handled are important in establishing good community-Service relations. It is crucial that the community not perceive internal investigation procedures as a coverup in which investigating officers are more interested in clearing their comrades than in fairly investigating the complaint.

Recommendation 8.8: INS should increase the number of women and minority-group officers in the applicant pool from which Office of Professional Responsibility investigators are selected.

Finding 8.9: INS misconduct complaint statistics are not complete. Statistical summaries of the receipt and disposition of complaints have not been regularly compiled and made available to employees and the public. Complete and accurate statistics on the investigation and disposition of misconduct complaints can foster a sense of professionalism and integrity among INS employees and instill confidence in the public that INS is responsive to all complaints.

Recommendation 8.9: INS should compile and publish, at least annually, a statistical summary of all complaints received and their final disposition. At a minimum, these summaries should include the following categories: the citizenship of the complainant, the race or national origin and sex of the complainant, whether the complaint was filed by an INS employee or a private individual, the INS region and district in which the complaint arose, the job title of the accused INS employee, the type of complaint, and the ultimate disposition of the complaint and any sanctions imposed. Such statistical summaries should be available to all INS employees and to the public.

Conclusion

The preceding eight chapters have reviewed the history of American immigration law and policy. This overview reveals the maze of immigration laws, practices, and procedures that confronts immigrants and prospective immigrants in pursuit of the rights, benefits, and privileges represented by the golden door. Unfortunately, in the process of immigrating to and remaining in the United States, persons can be and sometimes are deprived of their constitutional rights as well as certain benefits to which they may be entitled by law. This denial of rights can arise both when persons are unable or not allowed to exercise their constitutional rights and when due process protections are inadequate. Those who suffer from, or are susceptible to, the denial of rights include not only immigrants and prospective immigrants but also American citizens and residents who wish to be united or to remain united with their relatives from abroad.

In examining the practices and procedures of the Immigration and Naturalization Service for administering the immigration laws, the Commission found an agency with enforcement and service functions, two missions often in conflict with each other in the establishment of priorities for carrying out the statutory mandate of the agency. The Commission found that arbitrary exercises of discretion can and sometimes do occur in the handling of applications and petitions for benefits under the immigration laws. The Commission also found that limitations on the rights of individuals, including the right to counsel, the right to be free from unreasonable searches and seizures, the right to an impartial hearing, and the right to bail, can and do occur in the enforcement of immigration laws. The Commission found an existing enforcement program, known as "Operation Cooperation," and a proposed employer sanctions enforcement program that offer the potential for employment discrimination against bona fide job applicants and employees, particulary those who are identifiable with major immigrant groups. The Commission also found an agency complaint system in need of improvement for effectively handling public complaints of employee misconduct.

In examining issuance of visas by Department of State consular officers, the Commission found a process that is susceptible to and sometimes does result in arbitrary exercise of discretion, but does not include an adequate review mechanism for consular visa decisions.

In examining the current immigration laws, the Commission found a visa allocation system that has discriminatory effects due to its per-country limitations and colonial quotas. The Commission also found a law that has apparently subjected American citizens and residents to impermissible searches and seizures by local police officers attempting to enforce its provisions, despite their lack of knowledge or training in the intricacies and complexities of immigration law and procedure.

Although the series of amendments to the Immigration and Nationality Act that have been enacted by Congress since 1952 have attempted to provide a fairer and more equitable immigration system, problems in that process (as noted in the findings and recommendations that follow) require further refinement of immigration law, practice, and procedure.

These changes in the immigration system are necessary to ensure that all persons in America receive equal benefits and treatment under that process. To achieve these changes, either statutory enactments by Congress or the promulgation and implementation of new and/or revised regulations by agencies charged with the enforcement of the immigration law will be required. By adopting these revisions in immigration law, practice, and procedure, America can remove some of the tarnish from its symbolic golden door and move a step closer to ensuring that all Americans become full participants in the free and democratic traditions of our society.

Summary of Findings and Recommendations

Chapter 2

The Current Immigrant Selection System

Finding 2.1: The immigrant selection system under the current Immigration and Nationality Act has a discriminatory impact on prospective immigrants from certain countries or dependencies and thus results in the denial or delayed receipt of benefits under that statute for American citizens and resident aliens.

The effect of the per-country limits and colonial quotas under the Immigration and Nationality Act has been to subject intending immigrants from certain countries or dependencies, particularly those countries or dependencies that had previously been disfavored by United States immigration laws, to delays of up to 12 years (as of February 1979) for visas while immigrants from other countries can obtain visas immediately. Repeal of the national origins quota system and the enactment of the 1965 amendments to the McCarran-Walter Act was designed to afford all intending immigrants an equal opportunity to enter the United States on a first-come, first-served basis without regard to their race or national origin. But instead of eliminating the discrimination caused by the national origins system, these numerical limitations operate to maintain a proportional representation of immigrants from various countries similar to that which existed in the United States prior to 1965.

The colonial quotas have had the effect of limiting the immigration of natives of colonial areas on the basis of their race. Although they have been denounced as discriminatory both in intent and in operation, these quotas still exist and are enforced today. The imposition of per-country limitations on the number of immigrants rather than allowing unrestricted migration within the worldwide ceiling has perpetuated the built-in discriminatory effects of previous immigration laws that distinguished among intending immigrants on the basis of their country of origin. Where the intended beneficiary of a relative preference is a United States citizen or resident alien, that American resident correspondingly suffers discrimination on the basis of national origin.

The purpose and intent of the immigration laws are being frustrated by the present annual per-country limitations of 20,000 immigrant visas and colonial quotas of 600 immigrant visas. First, it is apparent that applicants are not being given priority strictly according to their date of filing and "without regard to their place of birth." Persons from certain countries must wait 8 to 10 years to obtain visas, while persons within the same preference category but from other countries can obtain visas immediately. Second, the variance in waiting periods frustrates the Immigration and Nationality Act's primary purpose—the reunification of families. For example, the brothers of United States citizens who seek to emigrate from the Philippines must wait many years, whereas brothers of United States citizens who wish to migrate from Britain can obtain visas after waiting only 6 months.

Recommendation 2.1: Congress should amend the Immigration and Nationality Act to eliminate the per-country numerical limitations and the colonial quotas and provide for admission within the annual worldwide ceiling of 270,000 on a first-come, first-served basis in accord with the existing six preference categories.

The decision as to the number of visas to be granted annually is a political decision to be made by Congress. The Commission's concern is only with the nondiscriminatory application of that visa policy once the number of visas is decided by Congress.

If United States immigration laws are to be successful in providing an equal opportunity to all intending immigrants, regardless of their ancestry or place of birth, and in promoting the reunification of families, the current discriminatory system of numerical quotas on the number of immigrants from each country and dependent territory must be abolished.

Abolition of the per-country limitations and colonial quotas would ensure that all persons are treated equally under the laws and would only subject applicants to the worldwide ceiling of 270,000 immigrant visas and the existing six category preference system which allocates visas in the following manner:

> *First preference:* unmarried sons and daughters of United States citizens (20 percent of the annual worldwide ceiling);
>
> *Second preference:* spouses and unmarried sons and daughters of lawful resident aliens (26 percent plus any visas not required for the first preference);
>
> *Third preference:* members of the professions and scientists and artists of exceptional ability, and their spouses and children (10 percent);
>
> *Fourth preference:* married sons and daughters of United States citizens and their spouses and children (10 percent plus any visas not required for the first three preferences);
>
> *Fifth preference:* brothers and sisters of United States citizens and their spouses and children (24 percent plus any visas not required for the first four preferences); and
>
> *Sixth preference:* skilled and unskilled workers in occupations for which labor is in short supply in this country, and their spouses and children (10 percent).

This would enable all prospective immigrants to obtain visas based strictly on their priority date, first-come, first-served, without consideration of their country of origin. Although the elimination of these numerical limitations would initially allow certain countries to obtain more than the 20,000 visas currently available because of their already extensive waiting lists, this system, as demonstrated in the appendix to this report, would allow all American citizens and residents an equal opportunity to be reunited with their close relatives abroad, whether they come from Mexico or Hong Kong or Ireland. Thus, the country of origin of intending immigrants and their United States relatives would no longer be considered in determining the length of the waiting period for visas.

Chapter 3

INS Service and Adjudications Functions

Finding 3.1:

a. Although minorities and women make up a significant portion of the INS work force, they have little or no participation in policy formulation and decisionmaking within INS.

As of September 1978 the INS work force in the General Schedule (GS) pay system[1] included slightly over 28 percent minority employees and approximately 35.5 percent female employees. Most of those employees were concentrated in the lower grade levels, with 74 percent of minority employees and 88 percent of female employees at or below the GS-8 level. Only 3 percent of minority employees and 2 percent of female employees were employed at or above the GS-12 level. In contrast, white employees dominated the upper management and supervisory levels and held 92.7 percent of all jobs at or above the GS-12 level.

b. Few INS employees staffing the Service's contact points with the public have racial or ethnic backgrounds similar to those of many immigrants. This has contributed in part to a strong public perception that persons, particularly those of minority background, are often treated rudely or insensitively by INS employees.

Recommendation 3.1:

a. The INS should continue its commendable efforts to hire minority and female applicants for Service jobs. At the same time, the agency should exert greater effort to place minorities and women in policy and decisionmaking positions of the agency.

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[1] Nearly 96 percent, or slightly over 11,100 INS employees, were employed in the GS pay system which, in 1978, ranged in grade from GS-1 through GS-18. Under the reorganization of the civil service, those positions above GS-15 have now been assigned to a senior executive service.

b. The INS should also make a concerted effort to employ more bilingual persons, particularly members of major ethnic immigrant groups such as Hispanics and Asians, at its information counters in order to provide better service to members of those communities.

Finding 3.2: INS contact points with the public are understaffed and are not equipped to provide adequate service and information to many persons.

Recommendation 3.2:

a. INS should devote more resources to staffing its contact points with the public to provide adequate service and information to all persons.

b. INS should provide all employees whose jobs involve contact with the public with training in human relations as well as training in the complexities of immigration law and INS procedures. This training should be provided not only for new employees prior to their placement on the job but also for present employees as part of a continuing inservice training program.

Finding 3.3: No effective procedure currently exists through which applicants can obtain information on the status of their cases.

INS loses many applicants' files mainly because of its ineffective manual retrieval filing system. While INS, in recognition of this problem, has begun development of a computerized system for tracking and retrieving files, most INS offices are not computerized.

Recommendation 3.3:

a. INS should develop and implement specific procedures by which applicants can obtain accurate information concerning the status of their applications.

b. INS should modernize and make more efficient its system for filing applicants' records. INS should computerize all of its offices to enable its employees to locate files and records quickly.

Finding 3.4: Large backlogs exist in the number of applications for immigration benefits awaiting adjudication by INS.

Long waiting periods, which can stretch from several months to several years, often interfere with the reunification of families, including those of United States citizens. Although the Service has tried to reduce the backlog, a large number of applications still await adjudication.

Recommendation 3.4: Congress should appropriate additional resources to increase INS adjudications staff positions.

Finding 3.5: The absence of clear Service guidelines and vigilant firstline supervision results in inconsistent or erroneous decisions under the extensive discretionary authority of INS adjudicators to grant or deny applications. Moreover, in such areas as the public charge provision where some guidelines exist, INS adjudications are often perceived by the public as inconsistent. To reduce arbitrary exercises of discretion by INS adjudicators, the INS has recently adopted a Service-wide program for quality control of adjudications.

Recommendation 3.5: To ensure effective quality control of adjudications under its new program, the INS should:

a. Publish precedent decisions and unusual or difficult cases as they arise and make them available to all adjudicators.

b. Hold supervisory adjudications officers responsible for reviewing and ensuring the accuracy and consistency of all decisions.

c. Provide supervisors, upon appointment, with further training in immigration law and supervisory techniques to enable them to review all decisions adequately.

d. Implement guidelines clarifying Service policy on difficult sections of the law, such as the public charge provision, specifying the proper interpretation of the law and the evidence to be considered in making such determinations.

Finding 3.6: The combining of both adjudicative/service and enforcement responsibilities in INS results in a subordination of the service function to the enforcement function.

Although INS has established satellite offices in Los Angeles and New York to provide information and services to the public in an attempt to separate its adjudicative/service functions from its enforcement responsibilities, problems continue to exist at other INS offices.

Recommendation 3.6:

a. Congress should create a Border Management Agency within the Department of Treasury and then transfer the INS enforcement function to that agency. Such legislation would enable INS to concentrate all its resources on its service activities and thereby provide the public with improved service.

b. INS should also totally separate its service functions from its remaining enforcement activities, preferably by establishing more satellite offices.

Chapter 4

The State Department and the Consular Visa Process

Finding 4.1: It would be sound procedural practice for all consular officers to prepare written memoranda of their decisions on visa applications that set forth fully their conclusions and the evidence supporting their conclusions. In cases where the decisions of the consular officer are challenged, the written memoranda would facilitate the review process.

Recommendation 4.1: The Secretary of State should promulgate regulations that require each consular officer to record in written memoranda a detailed statement of the reasons for the decision on each visa application.

Finding 4.2: The current Department of State process for the review of consular visa denials does not adequately protect aggrieved parties from improper exercises of consular discretionary authority.

Although the denial of a visa effectively bars a person from legally entering the United States, the visa application process does not contain adequate procedural safeguards to ensure that visa applicants receive a full and fair hearing on the merits of their case and that the final decision is free from an arbitrary exercise of discretionary authority by a consular officer. Except for the current, limited, managerial-type review, there is no other review for certain exercises of consular discretionary authority. Factual determinations by consular officers, no matter how arbitrary, are not reviewable by the Secretary of State or administrative designees of the Secretary or through the judicial process.

Even conscientious and dedicated consular officers can make mistakes of law or fact. Both the Department of State and the Consular Officers' Association have recognized and admitted that the performance of consular officers is, at times, uneven. Notwithstanding, aggrieved parties who have suffered from an abuse of consular discretionary authority often have no redress from that error.

The consequences that can arise from a visa denial mandate a more formalized review process that provides for greater due process. As the Board of Immigration Appeals stated in the *Matter of S- and B-C-*, 9 I & N 436, 446 (1960) (quoting the Report of the President's Commission on Immigration and Naturalization, January 1, 1953, p. 177):

> Shutting off the opportunity to come to the United States actually is a crushing deprivation to many prospective immigrants. Very often it destroys the hopes and aspirations of a lifetime, and it frequently operates not only against the individual immediately but also bears heavily upon his family in and out of the United States.

The adoption of a more formal system of review would make consular officers accountable for their decisions and would be consistent with the current appellate practices of other Federal agencies.

Recommendation 4.2: Congress should amend the Immigration and Nationality Act to vest the visa-issuing authority in the Secretary of State and to further authorize the Secretary of State to create a Board of Visa Appeals,[2] similar in function to the Board of Immigration Appeals.

The Board of Visa Appeals should be vested with the jurisdiction to hear appeals of consular visa denials wherein the action, findings, and/or conclusions of the consular officer with respect to a visa application are alleged to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The function of such a Board would be particularly important in immigrant visa cases that affect the reunification of United States citizens and legal residents with families abroad and the loss of technical and professional skills by American businesses. Any aggrieved party, including American citizens, legal residents, and businesses, should have standing to file an appeal from an adverse consular visa decision. The Board, through a majority vote, should have the power to affirm, to remand for further factfinding, or to reverse a consular visa refusal in any case. The Board should deliver its decision in writing and transmit copies to the Bureau of Consular Affairs of the Department of State and to the denied visa applicant or other aggrieved party(ies) who filed the appeal. In unusual circumstances, the Secretary of State for good and compelling reasons should have the authority to overrule a decision of the Board of Visa Appeals.

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[2] The creation of a Board of Visa Appeals was suggested as early as 1955 by the Administrative Law Section of the American Bar Association. That recommendation was adopted by the Administrative Law Section in the form of a resolution that stated:

> Resolved, that the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:
>
> "Be it resolved, that it is the opinion of the American Bar Association that there be established a Board of Visa Appeals with power to review the denial by a consul of a visa and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end."

The recommendation was later approved by the Board of Governors of the American Bar Association. 81 Reports of the ABA 426 (1956).

Finding 4.3: The arbitrary exercise of discretionary authority by consular officers can be attributed, in part, to deficiencies in the Department of State training program for consular officers.

Inadequate training and supervision of consular officers is one cause of the lack of uniform decision-making in the consular visa process. The Department of State and the Consular Officers' Association have recognized the need for improvement in this area. To correct this problem, the Department has upgraded its consular officer training program. According to the Consular Officers' Association, however, deficiencies in language and area studies training still persist.

Recommendation 4.3: The Department of State should continue to place emphasis on the improvement of training programs for consular officers. These improvements should include more thorough language training and more extensive area studies courses on the culture and politics of the particular country to which the consular officer has been assigned.

Chapter 5

Employer Sanctions

Summary Finding: Although the exact nature and degree of the impact of undocumented workers on the American economy is unknown, most immigration experts agree that it is an issue of serious national concern and that there is an adverse impact on domestic unemployment for some of our citizens and legal residents. They are, however, divided on the manner in which to address the issue. Sharp divisions occur over the need for and/or efficacy of employer sanctions legislation as a unilateral solution to the undocumented worker issue. There is greater agreement on the negotiation of bilateral agreements between the United States and the major source countries to reduce the number of undocumented workers entering this country and to address and help remedy some of the economic conditions and factors that encourage the migration of citizens from the source countries to the United States in search of employment opportunities as a more equitable and effective solution.

Finding 5.1: The extent to which undocumented workers displace citizens and resident aliens from jobs will be increased if some employers are free to exploit them, for example, by paying them less than the minimum wage, because undocumented workers are afraid to assert their rights.

Recommendation 5.1: The Department of Labor should vigorously enforce the Fair Labor Standards Act and other labor laws to ensure that neither citizens nor aliens are required to work under unfair working conditions and to minimize job displacement.

Finding 5.2: The number of undocumented workers can be reduced by more effective immigration law enforcement, through the hiring of additional personnel and through the use of more modern law enforcement technology, such as computerized arrivial-departure records. The Commission believes that such an improved law enforcement effort can be accomplished without the dilution of individual civil rights.

Recommendation 5.2: The Congress should appropriate additional funds to the Department of Justice in order that the Immigration and Naturalization Service can more effectively enforce the immigration laws by expanding its work force and having available more modern law enforcement technology.

Finding 5.3: There are precedents for the development of working agreements to deal with the population flow between the United States and the major source countries for undocumented workers. It is recognized that the negotiation of such agreements must be linked with other outstanding issues between the United States and the source countries, the resolution of which would be to the advantage of all parties. Also, programs of economic cooperation and development can be worked out in such a way that they further develop the resources required to reduce the need for citizens in source countries to seek work in the United States.

Recommendation 5.3: The President should seek bilateral or multilaterial agreements or compacts with the major source countries for undocumented workers in order to reduce and regulate the population flow between those countries and the United States.

Finding 5.4: An employer sanctions law would be an unjustifiable imposition of law enforcement duties upon private persons and businesses, with undesirable consequences not only for the employer but also for the due process rights of job applicants. Moreover, increased employment discrimination against United States citizens and legal residents who are racially and culturally identifiable with major immigrant groups may be the unintended result of an employer sanctions law.

If sanctions against the employment of undocumented workers are enacted, unintentional employment discrimination against current or prospective employees by employers, even when they act in good faith, may not be preventable. Bona fide job applicants who are "foreign looking" or "foreign speaking" may be denied employment because employers are unable to make determinations of lawful immigration status. The inability to screen employees properly may result from inadequate employer resources for verification of status, insufficient verification guidelines, or the inability or unwillingness of employers to interpret or evaluate an individual's immigration status.

Increased enforcement efforts by Federal civil rights agencies have been proposed as a remedy for potential employment discrimination resulting from an employer sanctions law. However, the time, effort, sophistication, and expense typically required of a complainant to pursue an employment discrimination case to a successful conclusion are such that very few cases of discrimination would be redressed. Moreover, after-the-fact remedies are rarely adequate to compensate American citizens and legal residents for the discrimination that prevents them from the full enjoyment of and participation in our democratic society.

Recommendation 5.4:[*] Congress should not enact an employer sanctions law.

Finding 5.5: The development and implementation of a compulsory national identity card system or a compulsory national work permit system has been proposed as a tool to deal with some of the problems involved in implementing an employer sanctions law.

Studies by government commissions raise serious doubts relative to the possibility of developing a secure, tamperproof national identity card or work permit which would eliminate the market for false documentation, whether forged, lost, or stolen.

An even more fundamental objection, however, is that the availability of such a national identity card would provide a tool that could be used to violate the right to privacy of the individual.

Recommendation 5.5:[†] The Congress should not enact legislation for the development and implementation of a compulsory national identity card or work permit system.

Finding 5.6: INS currently conducts a program to verify the immigration status of employees which does not have adequate guidelines to protect current or prospective employees from employment discrimination.

Despite the unresolved national debate over employer sanctions, the INS has instituted a program, known in some areas as "Operation Cooperation" or the "Denver Project," to dissuade employers from hiring undocumented workers. Participation in this program is not always voluntary. Failure to cooperate in this program can subject a business establishment to a disruptive INS raid or area control operation, which in turn may subject employees to violations of their consitutional rights (for example, see chapter 6 of this report for a discussion of fourth amendment problems in INS area control operations).

More important, "Operation Cooperation" contains no safeguards to protect employees from unfair employment practices which have been or will be adopted by employers under the program. This leaves the program open to the same type of employment discrimination that might result from an employer sanctions law.

Recommendation 5.6:[‡] INS should terminate use of programs such as "Operation Cooperation."

Chapter 6

Apprehensions by the INS

Finding 6.1: The INS has failed to update its 1967 handbook, *Authority of Immigration and Naturalization Service to Make Arrests* (INS Manual M-69), which contains guidelines for interrogations and arrests of aliens by INS officers. Since its publication in 1967, several Supreme Court decisions interpreting the fourth amendment have restricted the conditions under which law enforcement officers are authorized to conduct searches and seizures. Although the INS has stated that a complete revision of that handbook is underway, no revised edition has been published. The failure of INS to issue a revised edition has resulted in criticism from the courts.

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[*] Commissioners Stephen Horn and Frankie M. Freeman have dissented from this recommendation. For their comments, see "Additional Statement by Vice Chairman Stephen Horn" and "Separate Statement of Commissioner Frankie M. Freeman."

[†] Commissioners Stephen Horn and Frankie M. Freeman have dissented from this recommendation. For their comments, see "Additional Statement by Vice Chairman Stephen Horn" and "Separate Statement of Commissioner Frankie M. Freeman."

[‡] Commissioners Stephen Horn and Frankie M. Freeman have dissented from this recommendation. For their comments, see "Additional Statement by Vice Chairman Stephen Horn" and "Separate Statement of Commissioner Frankie M. Freeman."

Recommendation 6.1: The INS should complete the revision of the handbook on INS arrest and interrogation authority and make it available to Service officers immediately in order to clarify for those officers the legal authority under which they may interrogate and arrest persons suspected of violations of the immigration laws.

Finding 6.2: INS area control operations have built into them procedures that can and do in some instances result in persons, including United States citizens and residents, being subjected to unconstitutional searches and seizures.

INS officers apparently select interrogatees during area control operations in one of three ways: (1) all persons within the target area; (2) on the basis of ethnic appearance; and (3) on the basis of a mere suspicion of alienage. INS area control operations are "unreasonable" seizures because each of the three standards currently used to determine which persons shall be interrogated during area control operations is constitutionally defective:

- The interrogation of all persons within a target area implies the absence of any interrogation selection criteria, violating the fourth amendment requirement of a reasonable suspicion based on specific articulable facts that each person interrogated has violated the law;
- The selection of interrogates on the basis of ethnic appearance is constitutionally impermissible without the presence of other factors giving rise to a reasonable suspicion; and
- The selection on a mere suspicion of *alienage,* even where based on articulable facts, is insufficient to justify interrogations of individuals during area control operations, because such surveys can be considered "seizures" under the fourth amendment and therefore require a suspicion of *unlawful presence* to detain persons.

Recommendation 6.2: INS should immediately cease its area control operations, as currently conducted, to prevent the continued violation of the constitutional and civil rights of individuals. INS interrogations of persons should be based only upon specific articulable facts which create a reasonable suspicion that the individual is unlawfully present in the United States in violation of the immigration laws.

Finding 6.3: Search warrants used by the INS to conduct area control operations are legally impermissible unless they conform to fourth amendment standards.

Criminal search warrants (see rule 41 of the Federal Rules of Criminal Procedure) and civil search warrants (see *Blackie's House of Beef, Inc.* v. *Castillo,* 480 F. Supp. 1078 (D.D.C. 1979)) must be based on probable cause and must name and describe with sufficient particularity the person or persons who are the subject of the search.

Civil warrants based on an administrative inspection theory may not properly be used by INS to search for persons suspected of immigration violations in business establishments where such businesses are not regulated and licensed and where the persons sought are not specifically named.

Recommendation 6.3:

a. Future INS searches should be based upon warrants that are supported by probable cause and that name and describe specifically the person or persons who are the subject of the search.

b. INS should discontinue its attempts to obtain warrants under an administrative inspection theory, since the courts have held that only regulated businesses are subject to such searches.

Finding 6.4: Local police involvement in enforcing the immigration laws has resulted in violations of the constitutional rights of American citizens and legal residents.

Although the Immigration and Nationality Act expressly authorizes local police involvement in the enforcement of Federal immigration laws in only one instance,[3] local police departments have not confined their enforcement of those laws to that portion of the statute. This expanded local police involvement has continued, notwithstanding admonitions from the Department of Justice and the Immigration and Naturalization Service that enforcement of immigration laws is the responsibility of INS.

Recommendation 6.4: Congress should clarify the Immigration and Nationality Act to specify that immigration laws should only be enforced by INS.

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[3] 8 U.S.C. §1324 (1976).

Chapter 7

Deportation of Immigrants

Finding 7.1: The right to counsel is not provided to suspected immigration law violators at all crucial stages of the deportation process.

Notwithstanding the consequences of the penalty of deportation, aliens subject to deportation hearings receive less due process protection than defendants in criminal proceedings. Defendants in criminal cases receive substantial due process protection because of the punishment or deprivation of liberty that can occur upon conviction. Aliens subject to deportation hearings may similarly suffer from the severe consequences of deportation, which means banishment from the United States and which "may result also in loss of both property and life; or of all that makes life worth living."[4] But as a result of a long line of Supreme Court decisions in which deportation hearings have been classified as civil proceedings, aliens subject to those hearings have not been accorded the full measure of due process available in criminal proceedings.

Although recent Court decisions, recognizing the similarity between deportation and punishment, have strictly construed laws that provide the grounds for deportation, the courts have continued to label deportation hearings as civil proceedings rather than look at the consequences of an order of deportation in determining the sufficiency of due process for aliens subject to deportation proceedings. In some nonimmigration cases involving the right to counsel, the Supreme Court has looked beyond the civil-criminal characterization of the proceeding to accord parties greater due process.[5] The consequences of deportation require a similar approach for providing due process to aliens in deportation hearings.

The courts have recognized that the assistance of counsel is one of the most important guarantees for the protection of constitutional and statutory rights of individuals. Although the Immigration and Nationality Act recognizes the right to counsel, it is expressly recognized only in exclusion and deportation proceedings.

It is unclear whether there is an absolute right to counsel between the time of the initial encounter with the INS agent and the actual hearing itself.

The right to counsel is deemed fundamental in criminal proceedings and is provided at an early stage of those proceedings. The presence of legal counsel helps prevent law enforcement officers acting under color of law from coercing or intimidating persons into making incriminating statements.

Because credible evidence indicates that INS agents obtain incriminating statements from individuals immediately after detention and apprehension, the subsequent availability of legal counsel only at the hearing itself is no more than illusory compliance with the constitutional right to counsel. Moreover, the absence of counsel during the prehearing stages of the deportation process may result in apprehendees or detainees foregoing a hearing and electing voluntary departure in some cases where facts or circumstances exist that would make them eligible to remain in the United States. But because such facts were not disclosed during an INS interrogation seeking information on their deportability, detainees may unknowingly waive statutory rights for which they are eligible under the Immigration and Nationality Act.

During the deportation process, indigent persons who have been detained or apprehended for suspected violations of immigration laws may not have the assistance of legal counsel. The Immigration and Nationality Act provides for the right to counsel, but it must be at no expense to the Government. Because some detainees appeared in deportation hearings without the assistance of counsel, the 1931 Wickersham Commission report recommended that detainees be advised of free legal services provided by charitable organizations. Almost 50 years later, the INS adopted a regulation incorporating this recommendation to that effect after litigation was instituted challenging the unavailability of counsel to indigent detainees. However, this new regulation applies only to those persons placed under formal deportation (or exclusion) proceedings, which represents only a small portion of those apprehended. Approximately 60,000 hearings were held in 1978, while 800,000 persons were given "voluntary departure" without the benefit of a hearing.

Recommendation 7.1: Congress should amend the Immigration and Nationality Act to require the Immigration and Naturalization Service to notify detainees at all crucial stages of the deportation process that they have a right to legal counsel and may be entitled to free legal counsel provided by charitable and legal service organizations. Due process requires that a detainee should have the availability of the assistance of counsel not merely at the actual hearing but at the earliest possible stage of the deportation process.

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[4] Ng Fung Ho v. White, 259 U.S. 276, 284(1922).

[5] In re Gault, 387 U.S. 1 (1966) (civil commitment of a juvenile); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (revocation of probation).

Finding 7.2: Current INS policies and practices in setting bail fail to adhere to acceptable standards of due process for the following reasons:[6]

- Bail is set for purposes other than to assure the appearance of the arrested alien at the subsequent hearing.
- There is a lack of consistency and comparability in the setting of bond.
- There are few written guidelines for measuring whether the bail recommended is appropriate.
- There is a lack of sufficient documentation in case files to justify either the bond recommended or the amount of bond set at the hearing.
- Few statistics are available which might indicate what are successful (and therefore appropriate) bond amounts in a particular case.

Recommendation 7.2: The INS, to provide a more uniform and equitable bond determination process, should establish a more objective bail system that includes the following:[7]

- Written guidelines to assist in the determination of appropriate release recommendations.
- A requirement that a detained alien is to appear before an immigration judge or a non-INS magistrate for an initial bond determination and for the advisement of his or her rights.
- More thorough investigations of the ties of the arrested person to the community in order to make more appropriate bail recommendations.
- The automatic entitlement of the detained alien to a redetermination of bond where he or she has been detained in excess of 48 hours.
- The maintenance of statistics and the development of programs for the monitoring of bond determinations so that future bond determinations may be more appropriately set.

Finding 7.3: The present deportation system does not provide all persons apprehended or detained by INS with the opportunity that should be provided for an expeditious or impartial hearing before deportation or removal from the United States.

A hearing is avoided by the device of "voluntary departure," although a deportation hearing could establish facts or constructions of law that provide grounds for relief from deportation. INS law enforcement officers, who are essentially prosecutorial personnel, currently offer voluntary departure to detainees with a warning of the risks of deportation hearings. This is a highly questionable practice, for the line between persuasion and intimidation is very thin, especially where an officer is acting under color of law. Voluntary departure is also a form of discretionary relief that an immigration judge can grant to the detainee after a deportation hearing on the merits of the case. A deportation hearing would prevent the unknowing forfeiture of statutory rights, granted under the Immigration and Nationality Act, which would make some detainees eligible to remain in this country.

The right to a hearing principally means the right to a hearing before an impartial judge. The current INS deportation process has been publicly criticized for not offering at least the appearance of an impartial hearing. This criticism stems primarily from the dual functions of INS, which is charged by statute with both law enforcement and adjudicative functions. The intermingling of the adjudicative and enforcement responsibilities within INS, as illustrated by the dependence of immigration judges on INS District Directors for funds with which to operate, undermines the adjudicative process.

Recommendation 7.3:

a. Congress should amend the Immigration and Nationality Act to establish a separate immigration court independent from the Immigration and Naturalization Service.

b. INS should direct its officers to refrain from counseling detainees to elect voluntary departure.

Finding 7.4: INS administrative arrest warrants are not obtained upon a finding, by a neutral judicial officer, of probable cause for apprehension or detention but because an administrative officer of INS deems it desirable or necessary.

Recommendation 7.4: Congress should amend the Immigration and Nationality Act to provide that administrative arrest warrants may be issued only by a neutral judicial officer on the basis of the finding of probable cause. This amendment to the act is necessary to bring the INS administrative warrant procedure into compliance with the requirements of the fourth amendment.

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[6] See INS, "A Comparison of the Bond-Setting Practices of the Immigration and Naturalization Service with that of the Criminal Courts" (Bruce D. Beaudin, consultant)(July 26, 1978), pp. 20–31.

[7] Ibid., p. 32.

Chapter 8

INS Complaint Investigation Procedures

Finding 8.1: Swift complaint resolution must be achieved to protect the public from misconduct by INS officers and to protect officers from unfounded allegations.

Prompt investigation of misconduct complaints is important for establishing good INS-community relations, for it enhances the integrity of INS in the enforcement and administration of the immigration laws. Although the INS has made substantial inroads into reducing its backlog of Office of Professional Responsibility cases, a significant backlog still exists.

Recommendation 8.1: INS should carefully monitor and enforce the new 60-day maximum investigative time limit imposed on Office of Professional Responsibility cases. INS should notify both the complainant and the accused employee of any delay in completing the investigation where an extension of investigative time is necessary.

Finding 8.2: Public awareness of the INS complaint process is important for reducing incidents of officer misconduct and for improving INS-community relations.

Although INS has taken steps to establish greater public awareness of its complaint process, segments of the public and some agency employees are not fully apprised of the exact procedure.

Recommendation 8.2:

a. INS should take immediate action to design and implement a more comprehensive and systematic procedure to inform the public of the existence of the Office of Professional Responsibility and the process to be used in filing complaints of misconduct. At a minimum, this procedure should include:

- Posting signs in all INS offices;
- Creating and using easily comprehensible complaint forms, in English and in other major languages;
- Making complaint forms available in all INS offices; and
- Supplying complaint forms to community organizations dealing with persons who may wish to file complaints.

b. INS should take prompt action to ensure that Service employees are informed of the existence of the complaint mechanism and the proper procedure to be used in filing complaints. In addition, each INS employee should have available an adequate supply of complaint forms or immediate access to them.

Finding 8.3: The current INS complaint process as set forth in its Operations Instruction does not require notification to the complainant of the receipt of his or her complaint, of the initiation of the investigative process, or of the results of the investigation. To assure the public that an agency is interested in preventing employee misconduct, a complaint process must treat complainants fairly and respond to their complaints. Courteous treatment of complainants and acknowledgement of their complaints are two necessary elements of a good complaint system.

Recommendation 8.3: INS should provide more information to complainants by amending Operations Instruction 287.10 to require the following:

a. Each complainant, upon filing a complaint, shall be provide a copy of the appropriate Office of Professional Responsibility investigation procedures and appeal provisions.

b. Each complainant shall receive written verification from the Office of Professional Responsibility that the complaint has been received and is being investigated.

c. Each investigator assigned to a case must interview the complainant and any other eyewitnesses to the incident.

d. Each complainant shall receive written notification of the result of the investigation into his or her complaint, and the sanction, if any, imposed on the officer involved.

Finding 8.4: The INS has taken significant steps to upgrade its complaint-process procedures through the reorganization of its internal investigations unit and the implementation of a new Operations Instruction. Deficiencies, however, remain in the revised complaint process:

a. No requirement exists in the Operations Instruction that an investigator be notified in writing of his or her assignment, along with the facts alleged in the complaint, or that he or she receive a copy of the complaint or any supporting documentation provided by the complainant.

b. The ambiguous "reasonably support" standard for determining whether a further investigation should be conducted may result in meritorious complaints being summarily closed. "Reasonably support" is not defined in the Operations Instruction nor are guidelines provided for applying this evidentiary standard.

c. The INS complaint disposition categories, as set forth in the Operations Instruction, of "sustained" and "not sustained" inadequately describe the actual disposition of complaints by the Office of Professional Responsibility. They fail to account for unfounded complaints, situations in which an accused employee is exonerated, and cases involving misconduct not based on the original complaint.

Recommendation 8.4: INS should amend Operations Instruction 287.10 to include the following provisions to improve the existing complaint investigation process:

a. When investigators are assigned to cases, they should be notified in writing of the assignment. They should also be provided with a copy of the complaint or a written statement of the allegations involved. When investigators are assigned to handle a full investigation, they should be given a copy of the preliminary report for that case.

b. A complaint should be dismissed only where a preliminary inquiry does not uncover any evidence of misconduct by an INS employee. The existing standard, which requires that the facts developed must "reasonably support" the allegation, is vague and therefore subject to inconsistent interpretations by decisionmakers. A complaint should not be dismissed after a preliminary inquiry where such inquiry does not clearly exonerate the accused employee.

c. Final disposition of complaints should not be restricted to the two currently existing categories of "sustained" or "not sustained," but should be expanded to include the five categories of "sustained," "not sustained," "exonerated," "unfounded," and "misconduct not based on the original complaint." Such an expanded system allows the decisionmaker greater accuracy and flexibility and increases public faith in the integrity of investigations by the Office of Professional Responsibility. Appropriate evidentiary inquiries should be conducted with a view towards the evidence required for each of the five possible ultimate dispositions of complaints.

Finding 8.5: There is currently no appeal process, in either the INS or the Department of Justice, for complainants whose allegations of INS officer or employee misconduct have not been sustained through investigation of the complaint by INS.

Recommendation 8.5: A Board of Review, as this Commission has recommended in previous public statements,[a] should be established. The members of that Board should be appointed by the Attorney General and its jurisdiction should include the review of INS misconduct complaints where the complainant files an appeal from the finding of the INS investigation.

Finding 8.6: Current INS guidelines as set forth in Operations Instruction 287.10 for selection of Office of Professional Responsibility investigators are inadequate and do not specify the procedure to be followed or particular criteria to be considered in selecting investigators. Inquiries into employees' professional conduct are sensitive operations and require experienced and conscientious investigators. The selection of persons to handle such cases is an important process and should be carefully monitored to ensure that only the best officers are chosen.

Recommendation 8.6: INS should amend its Operations Instruction 287.10 to include specific procedures to be followed by officers wishing to apply for such duty and to include guidelines to be applied in selecting Office of Professional Responsibility investigators. These guidelines should require consideration of such factors as:

a. an appropriate level of experience and skill in conducting investigations, and

b. a demonstrated attitude of fairness, thoroughness, and conscientiousness on the part of the applicant.

Finding 8.7: The guidelines for assignment of investigators to misconduct cases are inadequate.

The complaint process as set forth in Operations Instruction 287.10 does not require that the most experienced investigators be assigned to the most complex and serious cases of alleged misconduct and does not ensure that undue influence or an inference thereof, which may result from past or present working relationships between the investigator and the accused employee, is avoided in the investigator selection process.

Recommendation 8.7: INS should amend Operations Instruction 287.10 to include the following provisions to establish an effective and efficient system for assigning investigators to misconduct cases:

a. Investigators should not be assigned to handle professional misconduct cases arising in the same region to which they are assigned.

b. Investigators who are assigned to handle misconduct cases should be given formal training in

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[a] Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, statement, in *The Federal Bureau of Investigation Charter Act of 1979: Hearings on S. 1612 Before the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. (Oct. 24, 1979).

Office of Professional Responsibility procedures and techniques prior to handling such cases.

c. The most experienced investigators should be given the most complex and serious cases. In determining the complexity and seriousness of a case, such factors as the type of misconduct alleged, the rank of the accused employee, the number of complainants and employees involved, and the amount of any publicity received should be considered.

Finding 8.8: The small number of minority-group investigators selected and assigned by INS to handle misconduct complaint cases affects the public's perception of the fairness and impartiality of the investigation of complaints.

Community perceptions of the fairness and thoroughness with which public complaints are handled are important in establishing good community-Service relations. It is crucial that the community not perceive internal investigation procedures as a coverup in which investigating officers are more interested in clearing their comrades than in fairly investigating the complaint.

Recommendation 8.8: INS should increase the number of women and minority-group officers in the applicant pool from which Office of Professional Responsibility investigators are selected.

Finding 8.9: INS misconduct complaint statistics are not complete. Statistical summaries of the receipt and disposition of complaints have not been regularly compiled and made available to employees and the public. Complete and accurate statistics on the investigation and disposition of misconduct complaints can foster a sense of professionalism and integrity among INS employees and instill confidence in the public that INS is responsive to all complaints.

Recommendation 8.9: INS should compile and publish, at least annually, a statistical summary of all complaints received and their final disposition. At a minimum, these summaries should include the following categories: the citizenship of the complainant, the race or national origin and sex of the complainant, whether the complaint was filed by an INS employee or a private individual, the INS region and district in which the complaint arose, the job title of the accused INS employee, the type of complaint, and the ultimate disposition of the complaint and any sanctions imposed. Such statistical summaries should be available to all INS employees and to the public.

Additional Statement by Vice Chairman Stephen Horn

CIVIL RIGHTS IN IMMIGRATION

Nothing is more pitiful than a nation which stands helpless and immobilized when it should meet the needs of its own citizens and lawful residents. Yet that is exactly what is happening with respect to the lack of an effective national policy concerning the illegal aliens who are coming to this country to seek employment and a better life for themselves. Calling them by the euphemistic phrase "undocumented workers" does not make their entry any less illegal nor reduce their impact on employment opportunities for our own citizens. As Secretary of Labor Ray Marshall noted on December 2, 1979:

> If only half, or 2 million, of them are in jobs that would otherwise be held by U.S. workers, eliminating this displacement would bring unemployment down to 3.7%, which is below the 4% full-employment target set by the Humphrey-Hawkins Act.[1]

It should be clear that the illegal alien problem is not simply an Hispanic problem and is not limited to the five Southwest States; it is a national problem.[2] If one examines the employment situation in the North-Central States, in New England, and along the eastern seaboard, one can readily find thousands of non-Hispanic illegal aliens widely employed in both the large industries and the small businesses of those areas. As the Vice President's Task Force on Youth Employment concluded: "Estimates on the percentage of undocumented workers in the U.S. labor force range from 2 percent to as high as 10 percent."[3]

There is no doubt that the illegal aliens who are employed in the garment firms of Los Angeles, in the restaurants of the District of Columbia, or in the automobile factories of Detroit are hard working. Often they seek not only a better life for themselves, but also for those they have left behind in their native lands—families and relatives to whom they frequently send funds.[4] But as a matter of American national policy, citizens and lawful residents should not be left unemployed because the governments from which these illegal aliens flee are not meeting the economic needs or facing the population problems of their own people.

This Nation should be particularly concerned with the distressing working conditions in the low-skill, low-wage industries in which illegal aliens are employed and with the resultant denial of job experiences for our own citizens. It is a serious problem when entry level job experiences are denied to inner-city youth because these jobs are increasingly occupied by illegal aliens subject to the exploitation and fear created by unscrupulous employers and sometimes connived in by labor unions. Some have argued that Americans will not fill low-status, low-wage jobs and therefore illegal aliens are necessary if the work is to be done.[5] That is simply untrue. Such "we need them and they are happy here" arguments were last heard to justify plantation slavery before the Civil War.[6] The fact is that in each occupational category a majority of the positions are filled by American citizens. If workers are truly needed to perform specific seasonal tasks, then guest worker programs such as those utilized in various European countries might be instituted. Under such programs there could at least be a regularized procedure to assure the entry of needed workers to perform specific types of jobs (but not limited to a specific employer). Such a procedure would also ensure full payment and fringes, health clearance, and other accepted American practices too often neglected as some employers victimize the illegal alien as well as the broader public interest. It is clear that the problem of illegal immigration is a political as well as a human and a legal issue. That neither the Congress nor the President has faced these issues is tragic.

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[1] Harry Bernstein, "Illegal Aliens Cost U.S. Jobs—Marshall," an interview with Secretary of Labor F. Ray Marshall, *Los Angeles Times*, Dec. 2, 1979, p. I-1.

[2] Very simply, the estimate of illegal aliens is uncertain except that it is at least several million. Lawrence Fuchs, Director of the Select Commission on Immigration and Refugee Policy, has claimed that there are no more than 6 million undocumented workers and that no more than 50 percent of them are Mexican. Prof. Vernon M. Briggs, Jr., of Cornell, has also estimated that "it is likely that Mexicans account for no more than half of the annual flow of illegal aliens into the country." Vernon M. Briggs, Jr., "The Impact of the Undocumented Worker on the Labor Market," in *The Problem of the Undocumented Worker* (Albuquerque, N. Mex.: Latin American Institute of the University of New Mexico, n.d.), pp. 31-38, p. 33. In August 1978, the *Denver Post* reported a belief of the Mexican Ambassador to the United States, Hugo B. Margain, that without guest worker programs such as the so-called bracero program that there could be as many as 10 million illegal aliens in this country. ("Our Undocumented Aliens—Part Four, A National Debate What To Do?" in *Empire Magazine*, the Sunday magazine of the *Denver Post*, Aug. 6, 1978.) Estimates of illegal aliens in the United States have ranged from 3 to 12 million. For 1975 Lesko Associates estimated 8.2 million illegal aliens, of whom 5.7 million were estimated to be Mexican. The U.S. National Commission for Manpower Policy concluded that the average illegal alien population in 1977 was probably within the range of 3 to 6 million persons.

[3] The White House, *A Summary Report of The Vice President's Task Force on Youth Employment* (1980), p. 19.

[4] In the case of Mexico, it is estimated that the return of American dollars by illegal aliens in the United States is the largest dollar earner for Mexico—ahead of the dollars gained from American tourism. Wayne A. Cornelius, "Illegal Mexican Migration to the United States: A Summary of Recent Research Findings and Policy Implications," p. 14.

The Border Patrol has a difficult and dangerous task. It is understaffed and its members are underpaid. As one careful student of the subject has observed ". . .the legal immigration system of the United States has been rendered a mockery. . . ."[7]

There is big money and individual misery in the smuggling of illegal aliens across the American borders. Because our borders are largely unpatrolled and most illegal entrants can melt into our society, we are an attractive target, especially for those who come from Mexico where the government has failed to address the needs of its own people through either a sound economic or population policy. It is hoped that some of the billions of dollars now available within Mexico as a result of the development of its petroleum resources will go toward the development of labor-intensive food processing and textile industries in the northern states of that nation. Certainly the American Government has a stake in also providing appropriate assistance to encourage such a development. Increasingly unemployed American workers should not be the only form of foreign aid available to Mexico.

For those who seek to count illegal aliens to increase their political power, perhaps it would be wise to recall *Mathews* v. *Diaz,* 426 U.S. at 82, in which the Court noted that "Congress has no constitutional duty to provide *all aliens* with the welfare benefits provided to citizens. . . ."

Residents from my own State of California certainly stand to profit from counting illegal aliens and thus gaining a few more seats in the House of Representatives. But should foreign citizens—many of whom are transient and subject to deportation—be the basis of our representative process? Is it fair to the legitimate political interests of citizens in the North and the East (where there are probably proportionally less illegal aliens than in the Southwest) *not* to have their votes counted effectively in the formulation of national policy through that representative process simply because some States happened to have an enhanced apportionment as a result of the substantial presence of illegal aliens?

On August 4, 1977, the Carter administration proposed a package of legislative proposals to reform our immigration laws. One of the key recommendations was the call for employer sanctions to make illegal the hiring of so-called undocumented workers. Various ethnic communities quite properly expressed concern that employers might be reluctant to hire those with a shade of skin other than white for fear that they were undocumented workers and illegal aliens. In brief, the administration left out the essential element which is key to a fair employer sanctions policy and that is what some have described as a "secure" or "counterfeit-proof" social security card.[*] I agree with that criticism. If we are to deal with reality, and not find ourselves still discussing this matter a decade from now while millions of American citizens continue to be denied job opportunities, then the establishment of such a secure and counterfeit-proof social security card for any who wish to be employed must be a first order of business on the national legislative agenda.

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[5] The findings of the *1979 National Longitudinal Survey (NLS) of Youth Labor Market Experience* refute this myth: "Substantial numbers of youth are willing to work at less than the minimum wage. This extensive longitudinal study found that the youth unemployment rate (38.8% for black youth and 16.6% for white youth) was 37% higher than had been shown by the Current Population Survey monthly sample." *The New York Times,* Feb. 29, 1980, pp. A1 and A14.

[6] Professor Briggs has commented that, "No U.S. worker can compete with an illegal alien when the competition depends upon who will work for the lowest pay and longest hours and accept the most arbitrary working conditions. Hence, it is self-serving for employers to hire illegal aliens and claim simultaneously that no citizen workers can be found to do the same work. In the local labor markets where illegal aliens are present, *all* low-income workers are hurt. Anyone seriously concerned with the working poor of the nation must include an end to illegal immigration as part of any national program of improved economic opportunities." (emphasis supplied) Vernon M. Briggs, Jr. "The Impact of the Undocumented Worker on the Labor Market," in *The Problem of the Undocumented Worker,* p. 34.

[7] Ibid., p. 32.

With this exception, I have supported the recommendations for due process which we have made in the attached report—although at times I have felt that some of our proposals, if enacted, should be best described as "the Immigration Attorneys Relief Act of 1980."

/s/

Stephen Horn

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[*] Gerda Bikales, program associate for Population/Immigration, National Parks & Conservation Association, has made an effective case for such a card in "The Case for a Secure Social Security Card" (September 1978), 18 pp., available from National Parks & Conservation Association, 1701 18th Street, N.W., Washington, D.C., 20009. She notes that, "The Social Security card and the driver's license enjoy primary credibility as general purpose identification. . . ." (p. 9) "Forty-four States now affix a photograph of the driver on the license adding to the security of the document. . . ."(p. 10) Observing that 41 State jurisdictions now issue "impressive and official looking identification cards to non-drivers," Bikales adds that, "The dreaded I.D. has been brought in through the back door, by popular request!" (p. 11) She observes that "it is almost inconceivable how anyone could be damaged by revealing [bona fide legal residency in the United States]; on the contrary, it is universally acknowledged to be a highly advantageous quality, one that many millions all over the world are desperately trying to take on as their own." (p. 14) She favors "an upgraded Social Security card" as *"the least drastic alternative"* (p. 14) and recalls that in July 1973, the Report [*Records, Computers and the Rights of Citizens*] of the [HEW] Secretary's Advisory Committee on Automatic Personal Data Systems "provide further assurance that Social Security numbers were legislatively intended by the Congress 'to be available for use in preventing aliens from working illegally and public assistance beneficiaries from receiving duplicate or excessive payments'." Ibid., p. 121.

Another strong advocate of "an identification system which would apply to all workers" is Secretary of Labor Ray Marshall. He believes that "a noncounterfeitable Social Security card could be issued to all workers changing jobs and to all newly hired persons, and that could be done for under $200 million. . . ." Harry Bernstein, "Illegal Aliens Cost U.S. Jobs—Marshall," an interview with Secretary of Labor F. Ray Marshall, *Los Angeles Times*, Dec. 2, 1979, p. I-1. Considering that *The United States Budget in Brief—Fiscal Year 1981* indicates (p. 52) that "unemployment recipients are estimated to average 2.9 million per week in 1980 and 3.4 million per week in 1981" with outlays for unemployment compensation estimated to increase $3.2 billion "from $15.6 billion in 1980 to $18.8 billion in 1981," a $200 million investment to open up perhaps millions of jobs for citizens and permanent residents is a very cheap investment indeed.

Separate Statement of Commissioner Frankie M. Freeman in Opposition To Majority Vote Against Employer Sanctions

The recommendations against employer sanctions contained in chapter 5 and approved by a majority of the Commission are unfortunate in that they are fashioned on false premises and totally ignore certain fundamental facts.

The first is a simple one. The United States of America is a sovereign nation and has the right and the responsibility to determine who may enter the country and the conditions under which they may enter. Numerous studies have shown that the primary reason people enter the country illegally is economic—the lack of jobs and opportunities in their native lands "push" them out and the availability of both jobs and opportunities in the United States "pull" them into this country. These "push-pull" factors leave the government with the choices of: (1) ignoring the situation, (2) increasing the number of Border Patrol agents in order to fully interdict unlawful immigration, or (3) reducing the "push-pull" factors. The first is irresponsible and untenable. The second is costly and virtually impossible; it would take an army to attempt to seal the southern border alone and it is far from clear that it could be accomplished. Experts in the field tend to believe that the only viable approach is to reduce the pull factor by making it more difficult for persons entering illegally to secure employment. This would be accomplished by imposing sanctions on employers who knowingly employ undocumented aliens. This is not an outrageous or unusual approach. The vast majority of Western nations impose controls on foreign workers. This is the standard practice throughout Western Europe and, incidentally, in Mexico.

A majority of the Commissioners in Recommendation 5.4 would oppose statutory sanctions against employers who hire undocumented aliens on the grounds that such a law would lead to employment discrimination against Americans or resident aliens who might be mistaken for undocumented aliens. In following this approach the majority would ignore the fact that employers who knowingly hire undocumented aliens do so not out of compassion for the oppressed, but out of simple greed. The majority would ignore the fact that their exploitation is made possible because the fear of detection and deportation prohibits undocumented aliens from protesting unsafe working conditions or wages below the minimum required by Federal law. Perhaps the most distressing aspect of the majority's opinion is it ignores the reality that undocumented aliens tend to be concentrated in the lowest paying jobs and displace American racial and ethnic minorities who traditionally have been employed in those fields, Hispanic and black Americans.

In 1977 the Carter administration reviewed the issue of how to structure an employer sanction program so as to guard against discrimination. This issue is again being studied by the Select Commission on Immigration and Refugee Policy. In my view, identification mechanisms can be developed which will minimize or effectively prevent discrimination against persons legally here. In my view, it is premature for the Commission to oppose employer sanctions on this ground without a thorough analysis of the forthcoming recommendations of the Select Commission.

While the plight of the oppressed throughout the world is central to the principles of any supporter of civil and human rights, it does not follow at all that the plight of the poor and oppressed of our own country should be ignored by the one agency that has traditionally championed their cause. From this I dissent.

/s/

Frankie M. Freeman

Appendix

Recommendation 2.1 calls for elimination of the per-country and dependent territory numerical limitations. Under that recommendation, all visas would be issued on a first-come, first-served basis within the existing six category preference system, and the number of visas available in any single year would be the current annual worldwide ceiling of 270,000. Unused visa numbers in any of the preference categories for relatives of American citizens and permanent resident aliens would continue to be available to the next relative preference category to assist in the reunification of families, the primary purpose of the Immigration and Nationality Act. This immigrant selection system is described in chart A1.

To exemplify how this system would operate, charts A2–A3 have been constructed from the Department of State's list of "Active Immigrant Visa Applicants Registered at Consular Offices as of January 1, 1979," and its February 1979 *Visa Bulletin.* [1] The Commission emphasizes that the statistics and figures in the following charts are imperfect reflections of current backlogs of visa applicants because some persons represented in these charts received a visa in calendar years 1979 and 1980 and because some applicants awaiting visas may no longer wish to immigrate to this country. They are used here only to illustrate the operation of an immigrant selection system without per-country and dependent territory numerical limitations (under Recommendation 2.1 of this report) and, further, to show how the apparent backlog of visa applicants would affect that system in its first few years of operation.

In constructing these charts, the following assumptions were made:

1. An assumption was made that all persons represented on the "Active Immigrant Visa Applicants" list did in fact wish to immigrate to the United States.
2. Countries or dependent territories whose visa applications were not current (according to the February 1979 *Visa Bulletin)* were matched to the totals for visa applications on file for that country or dependent territory (as listed in "Active Immigrant Visa Applicants Registered at Consular Offices as of January 1, 1979").

The total visa applications on file were divided by the number of years over which the visa applications have accumulated.

Thus, an assumption was made that the annual demand for visas from that particular country or dependent territory was approximately the same in each year.

3. In dividing the visa numbers in a particular year, the further assumption was made that visa applications were also proportionately equal in any single month of that year; i.e., one-twelfth of the approximate average annual visa demand for a specific country or dependent territory would constitute the number of visa applicants in a 1-month period for that country or dependent territory.

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[1] The charts included in this appendix were originally based on the seven category preference system which existed prior to 1980. In March 1980, the enactment of the Refugee Act altered the immigrant selection system by eliminating the seventh preference category of conditional entrants and establishing a separate worldwide ceiling for refugees. It also reduced the annual worldwide ceiling for the remaining six preference categories from 290,000 to 270,000, while increasing the number of second preference visas available each year from 20 percent to 26 percent. Refugee Act of 1980, Pub. L. No. 96–212 (to be codified in scattered sections of 8 U.S.C.).

As a result of this recent amendment of the Immigration and Nationality Act, the charts accompanying this appendix have been altered to reflect how the new six category preference system, without per-country and dependent territory limitations, would eliminate the backlog of visa applicants noted in the Department of State *Visa Bulletin* of February 1979 and list of "Active Immigrant Visa Applicants Registered at Consular Offices as of January 1, 1979."

CHART A1

The Seven Category Preference System

Preference category	Visa applicants eligible for that preference	Percentage of annual worldwide ceiling* available for that preference category	Total number of visas available in that preference category
First preference	Unmarried sons and daughters of U.S. citizens	20%	54,000
Second preference	Spouses and unmarried sons and daughters of lawful resident aliens	26%	70,200 plus any unused first preference visas
Third preference	Members of the professions and scientists and artists of exceptional ability, and their spouses and children	10%	27,000
Fourth preference	Married sons and daughters of U.S. citizens, and their spouses and children	10%	27,000 plus any unused first and second preference visas
Fifth preference	Brothers and sisters of U.S. citizens, and their spouses and children	24%	64,800 plus any unused first, second and fourth preference visas
Sixth preference	Skilled and unskilled workers in occupations for which a shortage of employable and willing persons exists in the U.S.	10%	27,000

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*The annual worldwide ceiling would be 270,000, the same ceiling which exists under current law. Likewise, the Commission suggests no change in the preference catagories, the percentages allocated to each preference category, or the system by which unused visas in one preference category are carried over to the next relative preference category.

Source: 8 U.S.C. §1153 (a) (1)-(6) (Supp. 1979), as amended by the Refugee Act of 1980, Public Law No. 96-212 (to be codified in scattered sections of 8 U.S.C.).

4. All persons applying for a first preference visa would be able to obtain one.

Because only 5,280 first preference visas were issued in 1978, an assumption was made that a substantial number of unused first preference visa numbers would be carried over and become available to applicants in the other relative preference categories. For purposes of these charts, it was assumed that 6,000 first preference visas would be used in the first year of the new immigrant selection system proposed in Recommendation 2.1.

Thus, 48,000 unused first preference visas would be available for applicants in other relative preference categories.

(Note that, as reflected in the accompanying charts, this computation was applied only during the first year of operation under the proposed immigrant selection system without per-country and dependent territory numerical limitations and not to succeeding years. Its application in succeeding years would undoubtedly result in the elimination of the fifth preference category backlog at a much earlier date.)

5. The estimated number of unused first preference visas in the first year of the proposed system was added to the total visa numbers that would be available for second preference visa applicants in the first year.

Thus, an assumption is made that 118,200 visas would be available to applicants for second preference visas.

6. An assumption was also made that there would be no unused second preference visas available for applicants in the fourth and fifth preference categories.

Thus, fourth and fifth preference visa applicants would be limited strictly to the percentage allotted under the annual worldwide ceiling. (Of course, if there were any unused visas in the first and second preference categories, they would be available to fourth and fifth preference visa applicants, thus reducing the potential backlog of visa applications in those preference categories that might exist at the initial implementation of the proposed immigrant selection system of Recommendation 2.1).

Based on those assumptions, charts A2–A3 were constructed. The charts for each preference category show the numerical and percentage distribution of immigrant visas within that preference for countries or dependent territories with potential backlogs. Thus, for example, the chart for second preference shows that during the first year following implementation of Recommendation 2.1, an estimated 79,917 of second preference immigrants would come from Mexico, the Philippines, Antigua, Belize, Hong Kong, and St. Christopher-Nevis, while the remaining 38,283 of second preference immigrants would come from all countries on a first-come, first-served basis. Charts for third and fifth preference indicate that more than one year would probably be required to eliminate the potential backlog of visa applications within those preferences. Charts for first, second, fourth, and sixth preference indicate that the potential backlog of visa applicants in those preference categories would probably be eliminated in the first year.

CHART A2

Elimination of Backlogs Within Preference Categories under Proposed New Immigrant Selection System Without Per-Country and Dependent Territory Numerical Limitations

	Preference					
Year	First preference	Second preference	Third preference	Fourth preference	Fifth preference	Sixth preference
	54,000[1]	70,200	27,000[1]	27,000[1]	64,800[1]	27,000[1]
	− 6,000[3]	48,000	−46,620[2]	−22,735[2]	−232,750[2]	−11,333[2]
YEAR 1	+48,000	118,200[1]	−19,620	+ 4,265	−167,950	+15,667
		− 79,917[2]				
		+ 38,283				
			27,000		64,800[1]	
YEAR 2			−19,620		−167,950[2]	
			+ 7,380		−103,150	
					64,800[1]	
YEAR 3					−103,150[2]	
					− 38,350	
					64,800[1]	
YEAR 4					− 38,350[2]	
					− 26,450	

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[1] Number of visas available in this preference category.

[2] Estimated number of persons seeking visas in this preference category (present backlog).

[3] Estimated number of persons seeking visas in this preference category (new applicants in year 1).

Source: Calculated from data in U.S., Department of State, "Active Immigrant Visa Applicants Registered at Consular Offices as of January 1, 1979," and *Visa Bulletin*, February 1979.

CHART A3

Breakdown of Visa Availability by Country of Origin Under Proposed New Immigrant Selection System

BACKLOGGED VISA APPLICATIONS

a) First preference: year 1

FOREIGN STATE OR DEPENDENT TERRITORY	1979-	%	
All countries	0	—	
SUBTOTAL	0	—	
	54,000	100.0	Available first preference visa numbers for use by applicants from all countries on a first-come, first-served basis.
TOTAL	54,000	100.0	

BACKLOGGED VISA APPLICATIONS

b) Second preference: year 1

FOREIGN STATE OR DEPENDENCY	1970-1978	TOTALS	%	
Mexico	48,573		44.10	
Philippines	28,007		23.70	
Antigua	649		0.54	
Belize	96		0.08	
Hong Kong	1,975		1.67	
St. Christopher-Nevis	617		0.52	
SUBTOTALS	79,917		67.61	
	38,283		32.39	Remaining second preference visa numbers available to applicants from all countries on a first-come, first-served basis
TOTALS	118,200*		100.0	

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*This figure is an estimte of the number of second preference visas that might be available in year 1, including unused first preference visas. In 1978, only 5,280 first preference visas were issued. In the State Department document listing the active immigrant visa applications registered at consular offices, only 4,879 first preference visa applications were on file. If 6,000 first preference visa numbers are used in year 1, then 48,000 unused first preference visa numbers would be available to second preference visa applicants. The 118,200 figure is reached by combining the normal allocation of second preference visa numbers (70,200) with the unused first preference visa numbers (48,000).

BACKLOGGED VISA APPLICATIONS

c) Third preference: year 1

FOREIGN STATE OR DEPENDENCY										Third preference: year 2	
	1969	1970	1971	1972	1973	1974	1975	TOTALS	%	1975-1978	%
India							869	869	3.22	4,523	16.75
Philippines	713	4,459	4,459	4,459	4,459	4,459	2,874	25,882	95.86	14,962	55.42
Hong Kong	24	40	40	40	40	40	25	249	.92	135	0.50
TOTALS	737	4,499	4,499	4,499	4,499	4,499	3,768	27,000	100.0	19,620	72.67
										7,380*	27.33
										27,000	100.0

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*Remaining third preference visa numbers available to applicants from all countries on a first-come, first-served basis.

BACKLOGGED VISA APPLICATIONS

d) Fourth preference: year 1

FOREIGN STATE OR DEPENDENCY	1972-1978	TOTALS	%	
Mexico	7,745		28.68	
Philippines	14,677		54.36	
Hong Kong	313		1.16	
SUBTOTALS	22,735		84.20	
	4,265		15.80	Remaining fifth preference visa numbers available to applicants from all countries on a first-come, first-served basis.
TOTALS	27,000		100.0	

BACKLOGGED VISA APPLICATIONS

e) Fifth preference: year 1

FOREIGN STATE OR DEPENDENCY	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	TOTALS	6%
Hong Kong	60	348	348	348	348	348	348	348	348	348	79	3,271	5.05
Philippines			7,255	7,255	7,255	7,255	7,255	7,255	7,255	7,255	6,659	59,699	92.13
St. Christopher-Nevis								163	324	324	74	885	1.37
Belize								4	10	10	3	27	0.04
Antigua									209	209	48	466	0.72
Korea											320	320	0.49
Mexico											132	132	0.20
China													
India													
St. Lucia													
St. Vincent													
Anguilla													
All others													
TOTALS	60	348	7,603	7,603	7,603	7,603	7,603	7,770	8,146	8,146	2,315	=64,800	100.0

BACKLOGGED VISA APPLICATIONS

	Fifth preference: year 2				Fifth preference: year 3		
FOREIGN STATE OR DEPENDENCY	1977	1978	TOTALS	%	1978	TOTALS	%
Hong Kong	269	180	449	.69	104	104	.16
Philippines	5,596	3,707	9,303	14.36	2,229	2,229	3.44
St. Christopher-Nevis	250	167	417	.64	97	97	.15
Belize	7	4	11	0.2	6	6	.01
Antigua	162	108	270	.42	65	65	.10
Korea	9,543	15,269	24,812	38.29	9,182	9,182	14.17
Mexico	3,931	6,288	10,219	15.77	3,784	3,784	5.84
China		3,896	3,896	6.01	9,953	9,953	15.36
India		2,162	2,162	3.34	5,528	5,528	8.53
St. Lucia		72	72	.11	182	182	.28
St. Vincent		77	77	.12	201	201	.31
Anguilla		14	14	.02	32	32	.05
All others		13,098	13,098	20.21	33,437	33,437	51.60
TOTALS	19,758	45,042	64,800	100.00	64,800	64,800	100.00

BACKLOGGED VISA APPLICATIONS

Fifth preference: year 4

FOREIGN STATE OR DEPENDENCY	1978	TOTALS	%	
Hong Kong	64	64	.10	
Philippines	1,315	1,315	2.03	
St. Christopher-Nevis	60	60	.09	
Belize	—		—	
Antigua	37	37	.06	
Korea	5,438	5,438	8.39	
Mexico	2,239	2,239	3.46	
China	5,895	5,895	9.10	
India	3,269	3,269	5.04	
St. Lucia	103	103	.16	
St. Vincent	123	123	.19	
Anguilla	21	21	.03	
All others	19,786	19,786	30.53	
SUBTOTAL	38,350	38,350	59.18	
	26,450	26,450	40.82	remaining fifth preference visa numbers available to applicants from all countries on a first-come, first-served basis.
TOTALS	64,800	64,800	100.00	

BACKLOGGED VISA APPLICATIONS

f) Sixth preference: year 1

FOREIGN STATE OR DEPENDENCY	1968-1978	TOTALS	%	
China	1,570		5.81	
Philippines	2,648		9.81	
Anguilla	225		0.83	
Antigua	2,483		9.20	
Belize	—		—	
Hong Kong	251		0.93	
St. Christopher-Nevis	2,083		7.71	
St. Lucia	1,836		6.80	
St. Vincent	237		0.88	
SUBTOTAL	11,333		41.97	
	15,667		58.03	Remaining sixth preference visa numbers available to applicants from all countries on a first-come, first-served basis.
TOTALS	27,000		100.0	

Source: Calculated from data in U.S., Department of State, "Active Immigrant Visa Applicants Registered at Consular Offices as of January 1, 1979," and *Visa Bulletin,* February 1979.

☆ U. S. GOVERNMENT PRINTING OFFICE : 1980 627-952/2508